IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERONICA LORRAINE DEHOYOS Defendant and Appellant.	Case No. S228230

Fourth District Court of Appeal, Case No. D065961
San Diego Superior Court, Case No. SCD 252670
The Honorable Peter C. Deddeh, Gale E.Kaneshiro, and
Lisa C. Schall, Judges

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APPELLANT'S OPENING BRIEF ON THE MERITS

APPELLATE DEFENDERS, INC.

Leslie A. Rose
Staff Attorney
State Bar No. 106385

555 West Beech Street Suite 300
San Diego, CA 92101
Bus: 619-696-0282
Fax: 619-696-7789
Email: lar@adi-sandiego.com

Attorneys for Appellant
Veronica Lorraine Dehoyos

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Plaintiff and Respondent,

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VERONICA LORRAINE DEHOYOS
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Lisa C. Schall, Judges

APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

Does Proposition 47 - the "Safe Neighborhoods and Schools Act" ("Proposition 47" or "the Act") - which made specified crimes misdemeanors rather than felonies, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?

STATEMENT OF THE CASE AND FACTS

On December 9, 2013, San Diego police officers Andres Ruiz and Tyler Cockrell were on patrol. (2RT 93, 95, 113, 161, 163.) Around 3:55 p.m. they drove by 3005 Osceola hoping to find Eric Anderson outside. (2RT 95, 130, 141, 145.) Co-appellant Gary DeGraff was outside the house and appeared to be cleaning the trunk of a vehicle. (2RT 95, 113-114.) DeGraff gave Ruiz permission to search him. (2RT 116.) Ruiz found a piece of paper folded up in DeGraff's right rear pocket, containing a large shard of crystalline material. (2RT 95-97, 117.) Based on his training and experience, Ruiz believed it was a useable quantity of methamphetamine. (2RT 101-102.)

As Officer Ruiz was arresting DeGraff, DeGraff yelled to his girlfriend, appellant-DeHoyos. Appellant came outside and Officer Cockrell contacted her. He asked her whether she had anything illegal on her and whether he could search her. She replied, "Yeah. I don't have anything on me." He searched her and found a baggie in her right front pocket. (2RT 164-166, 207.) Ruiz then arrested appellant. The substance in the baggie weighed .50 grams and tested positive for methamphetamine. (2RT 208, 213.)

On April 24, 2014, a jury convicted appellant of one felony count of possession of a controlled substance – methamphetamine (Health and Saf. Code, § 11377, subd. (a) ("§ 11377(a)" hereinafter). (1 CT 211; 4RT 441.)

On May 8, 2014, the court suspended imposition of sentence and placed appellant on formal probation for a period of three years. (1 CT 214-216; 3 RT 451-453.) Appellant filed a timely notice of appeal. (1 CT 194.)

On November 4, 2014, the voters enacted Proposition 47 which became effective the following day. Among the provisions in Proposition 47, various felony or wobbler offenses are reduced to misdemeanors, provided the defendant does not have any disqualifying prior convictions, so-called "super strikes," which are listed in Penal Code section 667, subdivision (e)(2)(C)(iv).[1] Appellant's conviction of possession of a controlled substance in violation of Health and Safety Code section 11377(a) is one of the offenses reduced to a misdemeanor by Proposition 47. There was no evidence in the record indicating appellant has ever been convicted of any disqualifying offenses. (1CT 6.)

Appellant's appointed appellate counsel filed an opening brief contending Proposition 47 applied retroactively to her because her case was not final when Proposition 47 became effective, citing the retroactivity rule in the case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*)). Consequently, appellant urged she was entitled to resentencing under amended Health and

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

Safety Code section 11377 and was not required to utilize the resentencing procedure established in section 1170.18. (*People v. DeHoyos* (2015) 238 Cal.App.4th 363, 367, review granted September 30, 2915, S228230 (*DeHoyos*).

In an opinion certified for partial publication, filed on June 30, 2015, the Court of Appeal affirmed the judgment of the superior court without issuing a remand order for the requested resentencing, holding "the language of Proposition 47 states the Legislature's intent for prospective, not retroactive, application with the requisite clarity."[2] (*Ibid.*) Appellant filed a Petition for Rehearing reiterating the *Estrada* argument, also emphasizing *Estrada's* companion case of *In re Kirk* (1963) 63 Cal.2d 761 (*Kirk*). In *Kirk*, the ameliorative statute was passed after the criminal act was committed when the defendant's case was pending on appeal – just as in appellant's case. (*Id.* at pp. 762-763.) The Court of Appeal denied the Petition for Rehearing on July 22, 2015.

On August 3, 2015, appellant petitioned this Court for review on the Court of Appeal's decision that she was not entitled, under the *Estrada/Kirk*

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[2]Although the opinion spoke in terms of the "Legislature's intent," presumably the Court of Appeal meant the electorate.

rule, to retroactive application of amended Health and Safety Code section 11377.

SUMMARY OF ARGUMENT

The issue before this Court is whether Proposition 47 applies retroactively to those defendants whose cases were on appeal on the date of the Act's effective date (*Kirk*-defendants) or whether the phrase "currently serving a sentence" and the recall process set forth in section 1170.18 can be discerned with sufficient clarity as the functional equivalent of a savings clause.[3] Appellant argues the Act contains no indication the electorate intended its provisions to be applied prospectively only. Appellant further argues the recall procedure in section 1170.18 for those defendants "currently serving a sentence" refers to only those defendants whose judgments are final, does not constitute an implied savings clause, and is not intended as the exclusive remedy for *Kirk*-defendants.

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[3]This Court is currently reviewing the analogous issue: Does the Three Strikes Reform Act of 2012 (§§ 667, subd. (e)(2)(C), 1170.12, subd, (c)(2)(C), which reduces punishment for certain non-violent third-strike offenders, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final after that date? (*People v. Conley*, review granted Aug. 14, 2013 [S211275].) Unlike the briefing in *Conley*, appellant emphasizes the importance of *Kirk* to her issue.

Proposition 47 is unique to the history of California jurisprudence by granting an unprecedented amount of relief. There is no other enactment which not only ameliorates sentences, as well as providing a mechanism for petitioning for the reduction of a sentence,[4] but also mitigates judgments by "de-felonizing" them *long* after they have become final. Specifically, section 1170.18 adds a recall procedure for defendants "currently serving a sentence" for a covered conviction, and a slightly different application procedure exists for defendants who have completed their sentence for a covered conviction. (§ 1170.18, subds. (a) & (f).) By adding section 1170.18, Proposition 47 stands to benefit thousands of defendants whose judgments were final well before the Act's passage, thus expanding its retroactive effect beyond what even *Estrada* would have allowed.

Under the *Estrada/Kirk* rule, "a legislative amendment that lessens criminal punishment is presumed to apply to all cases *not yet final* (the Legislature deeming its former penalty too severe), unless there is a 'savings clause' providing for prospective application." (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1464-1465; see also, *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196.) The rule in *Estrada* has been broadly interpreted; it applies even in those instances where there is no express declaration of

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[4]See also, Proposition 36, § 1170.126.

retroactivity. (*People v. Brown* (2012) 54 Cal.4th 314, 324.) Moreover, the rule applies to voter-enacted as well as legislative amendments. (*People v. Wright* (2006) 40 Cal.4th 81, 94-95.) In *Kirk*, a companion case to *Estrada*, this Court applied the *Estrada* holding to those defendants whose cases were on appeal and were not yet final, finding those defendants (*Kirk*-defendants) as being in precisely the same posture as those defendants (*Estrada*-defendants) who had not yet had judgment imposed at the time of the ameliorative amendment.

It is presumed voters know the law. (*People v. Shabazz* (2006) 38 Cal.4th 55, 65, fn. 8; *Anderson v. Superior Court* (1995) 11 Cal.4th 1152, 1161.) Thus in enacting Proposition 47, the voters were deemed aware of the *Estrada/Kirk* rule. In the absence of clear language indicating a contrary intent, defendants whose judgments were not final on the operative date of the Act (both *Estrada* and *Kirk* defendants) would gain the benefit of amelioration of lessened punishment.

Respondent has argued against appellant's position, and the appellate court adopted its argument. The Court of Appeal first found no express savings clause in the Act, but then went on to consider whether there were any other indicia of a legislative intent for Proposition 47 to apply prospectively, rather than retroactively. (*DeHoyos, supra,* at p. 367)

> " " '[W]hat is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' " [Citation.]"

(*DeHoyos, supra,* at p. 367, quoting *People v. Nasalga (Nasalga)* (1996) 12 Cal.4th 784, 793.)

Relying only on the " no automatic release" for those "currently serving a sentence" language, *DeHoyos* found a legislative intent for the Act to apply prospectively. The Court of Appeal also seemingly construed, without so stating, the recall petition process found in section 1170.18, subdivision (a) to be the functional equivalent of a savings clause and the exclusive remedy for *Kirk*-defendants. (*DeHoyos, supra,* at pp. 367-368.) *Kirk* was never addressed in the opinion, nor was the expansive language of section 1170.18, subdivision (m) – "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant."

As shall be argued, *post*, appellant does not suggest Proposition 47 allows automatic release of any defendant. Every defendant *must* undergo a formal determination of disqualifying priors, even *Kirk*-defendants, and thus would not be "automatically" released. Further, at worst, the "currently serving a sentence" language is ambiguous and is subject to rule of lenity. More reasonably, the phrase is a shorthand expression to differentiate those

individuals whose cases are final but whose sentences have not been completely served and may[5] petition under the stricter requirements and consequences of section 1170.18, subdivisions (a) and (b), from those whose sentences have been fully served and may petition under section 1170.18, subdivision (f) for "designation" of their convictions.[6]

Thus the phrase "currently serving a sentence," when read in the context of the presumptions created by *Estrada*, *Kirk* and the arguments made *post*, should be read to mean those defendants who are currently serving a sentence after their cases became *final*. Moreover, the recall petition procedure under section 1170.18 should not be seen as an implied savings clause, nor should it be the exclusive remedy for *Kirk*-defendants – but instead simply *a* remedy available to *Kirk*-defendants.

Construing the Act to apply retroactively under *both* the *Estrada/Kirk* rule and the newly created recall petition process more readily achieves the

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[5]If an inmate was close to completion of her/his sentence, s/he could choose to forgo a petition under section 1170.18, subdivision (a) and its restrictions and wait until completion to take advantage of the more lenient section 1170.18, subdivision (f) procedures and potential results.

[6]Section 1170.18, subdivision (k) provides that a "felony conviction that is recalled and resentenced under subdivision (b) *or* designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except. . . ." That exception is that for "*such resentencing*" (emphasis added) – and nothing is said about "designation" – there are firearm prohibitions. Whether the firearm prohibitions apply to relief under subdivisions (f), (g), is a question left to other litigation.

Act's objectives. These objectives include ensuring 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.) Since *Kirk*-defendants' cases were not final when the Act was passed, having the appellate courts remand for resentencing would more quickly achieve the above goals and they would still be subject to screening in the trial court for any "super strikes."

Accordingly, Ms. DeHoyos is entitled under *Estrada* and *Kirk* to have her conviction reduced to a misdemeanor under amended Health and Safety Code section 11377 *after* a formal determination of no disqualifying factors.

ARGUMENT

I. BECAUSE THE ACT REDUCES PUNISHMENT, IN THE ABSENCE OF CONTRARY ELECTORAL AND LEGISLATIVE INTENT, THE REDUCTION IS TO BE APPLIED RETROACTIVELY TO DEFENDANTS WHOSE JUDGMENTS ARE NOT YET FINAL UNDER THE *ESTRADA/KIRK* RULE.

A. Introduction.

On November 4, 2014, voters enacted Proposition 47 which amended the statutes for various theft, drug, and forgery offenses so that, going forward, they could be prosecuted only as misdemeanors for most defendants. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 3(3), 5–13, pp. 70–73; see generally *People v. Davis* (2015) 234 Cal.App.4th 1001, 1021; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1109.) Simply stated, Proposition 47 has both prospective and retrospective parts. The prosecution of pending and future offenses covered by the initiative simply follows the text of the amended offense statutes (e.g., Health & Saf. Code, § 11377(a)). For past convictions, the Act created a provision, section 1170.18, under which a defendant can request the trial court to reduce a covered offense to a misdemeanor.[7] When a trial court receives such a recall request, it "shall

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[7] Section 1170.18, subdivision (a) reads: "(a) A person currently serving a sentence who would have been guilty of a misdemeanor under

determine whether the petitioner satisfies the [eligibility] criteria" for relief under the initiative. (§ 1170.18, subd. (b).) Subdivision (m) of section 1170.18 further provides, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant."

Four groups of people are thus affected by Proposition 47: (1) defendants who were not sentenced before November 5, 2014 (*Estrada*-defendants); (2) defendants who were sentenced before November 5, 2014, but whose cases were not yet final (*Kirk*-defendants, e.g., they appealed and the appeals were not final)[8]; (3) defendants who were sentenced, who had not appealed or whose appeals were over before November 5, 2014, and are currently serving their sentence (§ 1170.18, subd. (a) petitioners); and (4) people who had completely served their sentences and indeed may have been sentenced long ago (§1170.18, subd. (f) petitioners). For the first group, no one contests the Act applies retroactively to those who have not yet been

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[Proposition 47 had it] been effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ." There is a slightly different application procedure for defendants "who ha[ve] completed [their] sentence for a [covered] conviction[.]" (See § 1170.18, subd. (f).)

[8]This class if *Kirk*-defendants would also include those defendants whose judgments were not final, i.e., the availability of an appeal had not yet been exhausted because the 60 days in which to appeal had not expired. (See e.g., *People v. Kent* (1976) 10 Cal.3d 611, 614.)

sentenced. (See *Estrada*, *supra*, 63 Cal.2d at p. 748.)[9] For the third group, no one questions those defendants who did not appeal or whose appeals have concluded and are currently still serving their sentences must seek relief via section 1170.18, subdivision (a).[10] It is also uncontested the fourth group should apply for relief under the application process in section 1170.18, subdivisions (f) through (h).

It is the second group of defendants at issue here. The question becomes how to apply Proposition 47 to Group 2, those individuals, like appellant, whose judgments were not yet final because they were on appeal (*Kirk*-defendants). Because nothing in the Act, or the electorate intent, indicates with sufficient clarity the presumption of retroactivity is meant to apply *only* to those defendants in Group 1, *Estrada*-defendants, and not to those in Group 2, *Kirk*-defendants, the Act should *also* apply retroactively to appellant.

The recall provisions of section 1170.18 provide a less complete remedy than *Estrada* due to the discretionary dangerousness finding provision

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[9]See PROPOSITION 47: "The Safe Neighborhoods and Schools Act" by J. Richard Couzens and Tricia A. Bigelow (January 2015), (§ II, C.) Indeed, counsel has found no case where a court refused to apply *Estrada* to defendants whose crimes had been committed before the Act, but had not yet been sentenced by November 5, 2015.

[10]As stated *ante*, if the "currently serving" defendant is on the verge of competing his/her sentence, s/he may opt to choose to complete the sentence and segue into the fourth category.

and firearm prohibition (see § 1170.18, subd. (k)), whereas *Estrada* mandates the lower sentence. While a section 1170.18 petition *may* be available to defendants who had already been sentenced when the proposition passed, the recall petition remedy is not equivalent to *Estrada* relief, and a *Kirk*-defendant should be not required to utilize the less effective remedy.

B. Standard Of Review And Applicable Principles Of Statutory Interpretation.

This case concerns the statutory interpretation of section 1170.18 and the interpretation of the legislative and electorate intent surrounding the Act as regards to the definition of "currently serving a sentence" in section 1170.18. This issue is a question of statutory construction. Issues of statutory construction are legal questions that are reviewed de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) Ballot initiatives and statutes are governed by the rules of statutory construction. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.)

The fundamental task in interpreting a statute is to determine the intent of the enacting body. In determining intent, the court looks to the ordinary meaning of the words themselves. (*Ibid.*) The intent of the law prevails over the letter of the law, and the words will be so read to conform to the spirit of the act, where possible. (*Ibid.*) "In addition, the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation

is enacted and to have enacted and amended statutes 'in the light of such decisions as having a direct bearing upon them.' [Citations.]" (*People v. Overstreet* (1986) 42 Cal. 3d 891, 897; *People v. Hernandez* (2003) 30 Cal.4th 835, 867.)

If the law uses an undefined term, whose boundaries are not self-evident, the statute is inherently susceptible to more than one reasonable interpretation and ambiguous. (*Canty, supra*, 32 Cal.4th at p. 1177.) Appellant acknowledges the phrase "currently serving a sentence" is not defined in the Act. However, when the language is susceptible of more than one reasonable interpretation, the construction should consider the history of the act, including "the measure as presented to the voters with any uncodified findings and statements of intent" included in the preamble. (*Canty, supra*, 32 Cal.4th at p. 1280.) Interpretations of ballot measures should be harmonized with their context. "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

As stated previously, penal statutes must also be interpreted under the rule of lenity – i.e., when language susceptible of two constructions is used in a penal law, it should be construed as favorably to the defendant "as its

language and the circumstance of its application reasonably permit." (*People v. Overstreet, supra,* at p. 896.) Stated another way, if a statute defining a crime or punishment is susceptible of two reasonable interpretations, the courts will ordinarily adopt the interpretation most favorable to the defendant. (*People v. Arias* (2008) 45 Cal.4th 169, 177.)

C. Proposition 47 Was Enacted To Reduce Punishment.

Proposition 47 reduced the punishment for various offenses. The primary purposes behind Proposition 47 can be found in the words of the initiative itself. Section 2 of the Act declares it is the intent of the people to focus "prison spending" on violent and serious offenses, and to "maximize alternatives" for non-serious, nonviolent crime, while directing savings into prevention and support programs. Section 3 declares it is the intent of the people to "[r]equire misdemeanors instead of felonies" for non-serious, nonviolent crime unless the defendant has prior convictions for specified violent or serious crimes.

As relevant here, Proposition 47 amended Health and Safety Code section 11377. Prior to that amendment, possession of controlled substances in violation of this section was a wobbler, i.e., an offense that is punishable either by imprisonment in the state prison or by incarceration in the county jail. As amended by Proposition 47, Health and Safety Code section 11377 now

provides that a violation of this section is a misdemeanor, unless the defendant has suffered a so-called "super strike" (§ 667, subd. (e)(2)(C)(iv)).[11]

D. The *Estrada/Kirk* Rule Governs Retroactive Operation of the Act And Also Benefits Defendants Whose Judgments Are Not Yet Final When The Mitigating Change In Punishment Took Effect.

When a change in the law results in a reduction of punishment for criminal conduct and the new statute contains no savings clause requiring punishment under the former statute, a criminal defendant is entitled to the benefit of the change in the law if his or her conviction was not yet final on the date the change went into effect. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1151, citing *Estrada, supra*, 63 Cal.2d at p. 740; see also *People v. Babylon* (1985) 39 Cal.3d 719, 722 [defendant entitled to benefit of change in law during pendency of appeal]; compare *People v. Floyd* (2003) 31 Cal.4th 179 [express prospective application provision negates retrospective application].) While under section 3 the ordinary presumption is that criminal statutes apply prospectively, an exception lies where a statute reduces

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[11]The new law disqualifies from sentence reduction a person who has a prior defined by Penal Code section 667, subdivision (e)(2)(C)(iv) or an offense requiring registration under section 290 of the Penal Code. Among the disqualifying offenses are "sexually violent" and other sex offenses, homicide or attempted homicide, solicitation to commit murder, specified assaults with a machine gun, possession of a weapon of mass destruction, and a serious or violent felony punishable by life or death. (§ 667, subd. (e)(2)(C)(iv).)

punishment; in that instance, no reason exists to believe that the benefit of the law should be restricted, and the ameliorative effect extends to all non-final judgments. (*Estrada, supra,* at p. 745; *People v. Brown*, *supra*, 54 Cal.4th at p. 324.)[12]

"[F]or the purpose of determining retroactive application of [a new statute], a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 305; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046; *In re Pine* (1977) 66 Cal.App.3d 593, 594; see also *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 106, 103 L.Ed.2d 334, 295-296]; *Bell v. Maryland* (1964) 378 U.S. 226, 230 [84 S.Ct. 1814, 12 L.Ed.2d 822] ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

In *Estrada*, this Court posed the question presented by the amendment to the law this way: "A criminal statute is amended after the prohibited act is committed, but before final judgment, by mitigating the punishment. What

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[12] Although *People v. Brown*, *supra*, 54 Cal.4th 314, recently narrowed somewhat the scope of the *Estrada* principle by finding a statute increasing the rate at which prisoners may earn credit for good behavior was not to be applied retroactively, this Court nevertheless reaffirmed its core applicability to reduced punishment for an offense as is the case here. (*Id.* at p. 324.)

statute prevails as to the punishment — the one in effect when the act was committed or the amendatory act?" (*Estrada, supra,* 63 Cal.2d at p. 742.) The Legislature had not stated whether the new or the old statute should apply to cases where the judgment was not yet final, so this Court had to determine the legislative intent from factors other than an express statement by the Legislature. (*Id.* at p. 744.)

This Court pointed to one factor which it considered to be of special importance:

> 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.

(*Estrada, supra*, 63 Cal.2d, at p. 745, emphasis added.)

On the day *Estrada* was decided this Court also filed an opinion in a companion case – *Kirk, supra*, 63 Cal.2d 761. In *Kirk*, the petitioner's appeal was pending when the ameliorative statute took effect. This Court indicated "[t]he problem is thus *precisely the same* as the one involved in the *Estrada* case, *supra*. The statute imposing the penalty for issuing the checks was amended *prior to final judgment* by ameliorating the punishment. Under the rule announced in that case the petitioner is entitled to the benefits of the amendatory statute." (*Id*. at pp. 762-763, emphasis added.)

In appellant's case, as was the case in the *Kirk*, the ameliorative statute was passed after the criminal act was committed when her case was pending in the Court of Appeal. And just like the defendants presently being prosecuted as misdemeanants for violations of statutes amended by Proposition 47 that occurred prior to November 5, 2014 and those whose sentences had not been imposed by that date (*Estrada*-defendants), those in appellant's position (*Kirk*-defendants) should be treated *precisely the same*.

Recently in *People v. Hajek & Vo, supra,* 58 Cal.4th 1144, this Court further addressed the issue regarding the retroactivity of a statute that mitigated punishment where a change in the law excluded pellet guns from the definition of a firearm. This Court stated:

> As we recently explained, *Estrada* represents "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.] We based this conclusion 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." ' [Citation.]"
>
> . . . .
>
> "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a

> specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]"

(*People v. Hajek & Vo, supra,* 58 Cal.4th at pp. 1195-1196, quoting *Brown, supra*, 54 Cal.4th at p. 324.)

In appellant's case, Health and Safety Code section 11377(a) now provides that violations of the statute constitute a misdemeanor unless the defendant has a disqualifying prior conviction. The "inevitable inference" that the electorate intended a mitigated punishment to apply to "every case to which it constitutionally could apply" is the same inference that one must inevitably draw from the reduction of punishment brought about by Proposition 47. Indeed, the inference is even stronger (assuming one can make an "inevitable" inference stronger) than the inference in *Estrada*, because of the voters' announced intent in Proposition 47 was (1) to maximize alternatives for non-serious and non-violent offenses such as appellant's conviction, and (2) to require misdemeanors instead of felonies for such crimes.

E. **The Act Contains Neither An Express Savings Clause, Nor Any Other Indication The Electorate Intended Its Provisions To Be Applied Prospectively Only. Further, The Recall Procedure In Section 1170.18 For Those Defendants "Currently Serving A Sentence" Does Not Constitute An Implied Savings Clause Because The Electorate Intended The Recall Procedure To Apply To Those Defendants Whose Cases Are Final, And Thus Is Not The Exclusive Remedy For *Kirk*-Defendants.**

DeHoyos recognized the Act contained no express saving clause, but found a fundamental equivalent by selecting various phrases in the statutory and electorate intent, thus rejecting appellant's *Estrada* argument. (*DeHoyos, supra,* at pp. 367-368) The issue then becomes whether the electorate's intent supports the Court of Appeal's proposition that the presumption of retroactivity currently being applied to *Estrada*-defendants was not meant to apply to *Kirk*-defendants as well.[13]

In cases in which the legislative act mitigates punishment for a particular offense, application of the *Estrada* rule is overcome only where the "Legislature clearly signals its intent to make the amendment prospective only, by inclusion or either an express savings clause or its equivalent." (*People v. Nasalga, supra,* 12 Cal.4th a p. 793, fn. omitted.) *Kirk,* as stated above, stands for the proposition that a defendant whose case is not yet final on appeal

[13]Although the opinion lacks somewhat in clarity, appellant submits the above statement is a fair description of the court's position.

is entitled to the *same presumption of retroactivity* of an ameliorative statute as a defendant who has yet to be sentenced, in the absence of any contrary legislative intent. (*Kirk, supra*, 63 Cal.2d at p. 763.) And so the electorate is presumed to have known of this presumption of retroactivity for defendants who are not yet sentenced (*Estrada*-defendants) and defendants whose cases are not yet final (*Kirk*-defendants) before it enacted the petition process in Proposition 47. (*People v. Shabazz, supra,* 38 Cal.4th at p. 65, fn. 8; *Anderson v. Superior Court, supra,* 11 Cal.4th 1152, 1161; *Walters v. Weed* (1988) 45 Cal.3d 1, 10-11; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1432.)

1. The "Currently Serving" Language Does Not Constitute The Functional Equivalent Of A Savings Clause.

Since Proposition 47 does not contain an express savings clause, the issue becomes whether contained therein a functional equivalent of a savings clause can be found. (*People v. Nasalga, supra,* 12 Cal.4th at p. 793.) When construing "any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. 'Our office is . . . "simply to ascertain and declare" what is in the relevant statutes, "not to insert what has been omitted, or to omit what has been inserted."'[Citation.]" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.) 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.] Further, ' "[w]e must assume that the Legislature knew how to create an exception if it wished to do so . . . ." [Citation.]' [Citation]." (*DiCampli–Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.)

Therefore, in order for *Kirk*-defendants to be denied the ameliorative benefits of Proposition 47, there must be an indication of electorate intent which describes with *sufficient clarity* that defendants who were on appeal when Proposition 47 was enacted are not entitled to the presumed retroactivity of this benevolent statute. (See *In re Pedro T., supra,* (1994) 8 Cal.4th 1041, 1049.)

a. *Pedro T., Nasalga, and Floyd.*

Pedro T., supra, 8 Cal.4th 1041, *Nasalga, supra,* 12 Cal.4th 784, and *People v. Floyd, supra,* 31 Cal.4th 179 are instructive on the issue of what statutory language qualifies as a functional equivalent of a savings clause.

This Court in *Pedro T.* found *Estrada* did not apply to an amendment that temporarily increased the penalty for vehicle theft, but then lapsed back to the lesser, former punishment under a "sunset" provision, and which had no express savings clause. (*Pedro T., supra,* 8 Cal.4th at p. 1045.) This Court held the Legislature clearly indicated, in the preface to the statute, its intent was to punish offenders more harshly in order to address the increasing threat of

vehicle thefts to the public. This Court relied upon "the following statement of purpose: 'The Legislature finds and declares that the rapid increase in motor vehicle theft has reached crisis proportions . . . . [T]he escalating problem of vehicle theft is nurtured by the lack of any serious deterrent to this crime . . . . [¶] [T]he Legislature believes that it is in the best interest for public safety to enhance the penalties for the crimes of vehicle theft and receiving stolen vehicles.' (Stats.1989, ch. 930, § 1, pp. 3246–3247.) Far from determining that a lesser punishment for vehicle theft would serve the public interest, the Legislature expressly declared that increased penalties were necessary. *Estrada* is not implicated on these facts." (*Id.* at pp. 1045-1046.) The Act, however, contains no such expressly declared statement which would clearly indicate the Legislature specifically intended that *Kirk*-defendants were unentitled to *Estrada* relief.

In *Nasalga*, this Court looked for indication of legislative intent to determine if the increased threshold amounts in section 12022.6, which did not contain an express saving clause, applied retroactively to cases not yet final at the time of the amendment. There the defendant was convicted of grand theft and the prosecution proved the loss amounted to $124,000. In addition to a sixteen-month state prison sentence for theft, the court imposed a two-year enhancement based upon the amount of the lost. At the time of the offense,

section 12022.6 provided a two-year enhancement where the loss exceeded $100,000. Prior to sentencing, the Legislature amended section 12022.6, increasing from $100,000 to $150,000 the amount of loss necessary to trigger the two-year enhancement. On appeal, the defendant claimed she was entitled to the amendment's ameliorative effect under *Estrada*. (*Nasalga*, *supra*, 12 Cal.4th at p. 789-790.)

This Court found the increasing of threshold amounts in section 12022.6 inferred a legislative intent to mitigate punishment for offenders so as to reflect the dollar's decline in value. (*Nasalga, supra,* 12 Cal.4th at p. 795.) This Court noted the Legislature could have expressed its intent contrary to *Estrada* and required prospective application, but nothing in the legislative history indicated such an intent. (*Id.* at p. 796.) Consequently, this Court found the amendments of section 12022.6 applied retroactively to the defendant. (*Id.* at p. 798.)

So if the electorate intended for the *Estrada* and *Kirk* presumption of retroactivity not to apply to the ameliorative statutes created by Proposition 47, it would have used language to the effect the petition process applies to all defendants "regardless of their conviction status." However, this is *not* what occurred. Indeed, previous ballot initiatives have employed explicit language making an ameliorative statute prospective. For example, this Court held in

Floyd that Proposition 36 of 2000, providing for treatment for nonviolent drug offenders, applied prospectively only, because the proposition expressly stated, "[e]xcept as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." (*People v. Floyd, supra,* 31 Cal.4th at p. 182.) Here, unlike in *Floyd*, Proposition 47 contains no such language.

b. The analysis in *DeHoyos* is unsound.

The Court of Appeal relied upon very limited language in the Act, the Legislative Analyst's analysis of Proposition 47, and the ballot arguments to construct a legislative intent for prospective, not retrospective, application. Simply, this language can be summed up with one phrase: "no automatic release for defendants currently serving a sentence," for this phrase, or the idea behind it, consistently appears in all three passages the court relied upon in the opinion. (*DeHoyos, supra,* at p. 368.) Appellant urges instead that application of *Estrada* and *Kirk* would *not* result in an automatic release of *Kirk*-defendants and the only way to construe "currently serving a sentence" – in light of *Kirk* – is to mean those defendants currently a sentence whose judgments are final. Hence, relying upon such language and phrases provides no foundation for the court's conclusion Proposition 47 does not apply

retroactively to *Kirk*-defendants. The passages the Court of Appeal relied upon are set forth below.

The court points to Section 3 of the measure, labeled "Purpose and Intent" which states: "In enacting this act, it is the purpose and intent of the people of the State of California to: [¶] . . . [¶] (4) Authorize consideration of resentencing for anyone who is *currently serving a sentence* for any of the offenses listed herein that are now misdemeanors. [¶] (5) Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Collectively, the court opined, these "two paragraphs indicate a legislative intent *not to permit the automatic application* of Proposition 47 to anyone *currently serving a sentence* for a listed offense. Instead, they indicate a legislative intent to authorize and allow resentencing only for those individuals whose criminal history and risk assessment warrant it." (*DeHoyos, supra,* at p. 368, emphasis added.) But such assumes the question at hand: did the electorate intend to include *Kirk*-defendants within the class of those "currently served?"

The two cited paragraphs do not answer *that* question. Paragraph 4 merely stated to the electorate that "consideration" is "authorized," not mandated, for reduction, for anyone who is "currently serving" a sentence –

without defining the latter term. Paragraph 5 informed the electorate that upon such consideration, presumably for anyone "currently serving" with no further elaboration, review of criminal history and risk assessment was required.

One cannot or should not read just those two paragraphs out of context. If one reads the remaining paragraphs, too, the full context indicates that misdemeanor treatment a la *Estrada-Kirk* is the electorate's intent. Thus, Paragraph (1) ensures murderers, rapists, and child molesters (i.e., super-Strikers) will not benefit from the Proposition, which is true for a current offender now, or an *Estrada-Kirk* defendant, or either a "currently serving" or "completely served" petitioner; Paragraph (2) creates the Safe Neighbors and Schools Fund, which is premised on cost savings from felony convictions, incarcerations, and supervision – and which prosecutorial resistance undermines; Paragraph (3) "*[r]equires misdemeanors instead of felonies for nonserious, nonviolent crimes* like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes" (emphasis added); and Paragraph (6) "[t]his measure will save significant state correction dollars . . . ." (Ballot Pamp., Gen.Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.)

In juxtaposition to the uncodified paragraphs above is section 1170.18, subdivision (m), which reads that "[n]othing in this section is intended to

diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant," is unaddressed by the *Dehoyos* Court. One such right or remedy, of course, is that which accrued to appellant by means of *Estrada,* and *Kirk,* i.e, a *Kirk*-defendant must be treated *"precisely the same"* as an *Estrada*-defendant and is entitled to the benefits of the amendatory statute. (*Kirk, supra,* 63 Cal.2d at pp. 762-763, emphasis added.)

The next language relied upon by *DeHoyos* is found in the Legislative Analyst's analysis of Proposition 47: "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." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legislative Analyst, p. 36, italics added.) (*DeHoyos, supra*, at p. 368, emphasis added.) Finally, *DeHoyos* noted the opponents of the initiative measure argued the "measure was 'an invitation for disaster' in part because it would 'make 10,000 felons eligible for early release.' (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) rebuttal to argument in favor of Prop. 47, p. 38; see also argument against Prop. 47, p. 39.)" The Court of Appeal seizes onto the counter argument from the proponents of the initiative which stated:

> " 'Proposition 47 does not require automatic release of anyone. There is *no automatic release*. It includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit.' (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) rebuttal to argument against Prop. 47, p. 39.)"

(*DeHoyos, supra,* at p. 368, emphasis added.)

The court's reliance on the above language also fails to show an electorate intent which describes with *sufficient clarity* that *Kirk*-defendants are not entitled to *Estrada* relief. The phrase "currently serving a sentence" is just as or more reasonably seen as a shorthand expression to differentiate those individuals whose sentences have not been completely served and may petition under the stricter requirements and consequences of section 1170.18, subdivisions (a) and (b), from those whose sentences have been fully served and may petition under section 1170.18, subdivision (f) for "designation" of their convictions. Since the voters were aware of this Court's opinion in *Kirk*, they knew *Estrada* would apply to those defendants whose cases were on appeal when the ameliorative change went into effect. (See *People v. Shabazz, supra*, at p. 65, fn. 8; *Anderson v. Superior Court, supra,* at p. 1161.)

Further, applying *Estrada/Kirk* to defendants in appellant's procedural posture does not call for the automatic release of any individual. For even if the issue of retroactive relief is raised on appeal, the appellate court would be required to remand to the superior court for a formal determination of no disqualifying factors. There, the District Attorney can run a thorough background check on each defendant to ensure there are no "super strikes" precluding Proposition 47 relief. If there are no disqualifying priors, only then would *Kirk*-defendants be entitled to *Estrada* amelioration. Indeed, every defendant, even *Estrada* and *Kirk* defendants, are subject to this type of determination and so "rapists, murderers, molesters and the most dangerous criminals" would not benefit from Proposition 47 resentencing.

Finally, if there is one aspect of Proposition 47 that seems fairly obvious, it is that resentencing from a felony to a misdemeanor is generally intended to reduce the overall length of punishment to which the eligible defendant is subject. There are two driving principles behind the reduction in punishment. First, the voters reassessed the crimes subject to Proposition 47 and determined their relative lack of severity did not justify a felony punishment. The arguments in favor of Proposition 47 in the official voter information guide, for example, refer to the crimes subject to reduction under Proposition 47 as "petty," "low-level," and "nonviolent." (Voter Guide, Gen.

Elec. (Nov. 4, 2014), argument in favor of Prop. 47.) Second, and perhaps more importantly, Proposition 47 was intended to save taxpayer money. The arguments in favor of Proposition 47 advertise that it "[s]tops wasting money on warehousing people in prisons for nonviolent petty crimes, saving hundreds of millions of taxpayer funds every year." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Analysis of Prop. 47 by Leg. Analyst.)

The ballot pamphlet explained to voters that "[t]he people enact the Safe Neighborhoods and Schools Act to ensure that *prison spending* is focused on *violent and serious offenses*, [and] to *maximize alternatives for nonserious, nonviolent crime*." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70, emphasis added.) The official Voter Guide for Proposition 47 stated that a "yes" vote would mean:

> Criminal offenders who commit certain nonserious and nonviolent drug and property crimes would be sentenced to reduced penalties (such as shorter terms in jail). State savings resulting from the measure would be used to support school truancy and dropout prevention, victim services, mental health and drug abuse treatment, and other programs designed to keep offenders out of prison and jail. . . . Authorizes felonies for registered sex offenders and anyone previously convicted of

rape, murder or child molestation. *Saves hundreds of millions of dollars every year and funds schools, crime victims, mental health and drug treatment.*

(http://www.voterguide.sos.ca.gov/en/propositions/47/, emphasis added.) Applying *Estrada/Kirk* to defendants in appellant's procedural posture more *quickly* achieves these goals *and*, contrary to the Court of Appeal's interpretation, would do so without allowing thousands of violent criminals out to roam our streets.

2. Section 1170.18 Is Not An Implied Savings Clause And Neither Is It The Exclusive Remedy For *Kirk*-Defendants.

The holding of the Court of Appeal requires appellant to utilize section 1170.18 to obtain relief under the Act. By so limiting *Kirk*-defendants to this one remedy, *DeHoyos* effectively finds the language "currently serving" and implications therefrom to be the functional equivalent of a savings clause. (*DeHoyos, supra,* at p. 368.) The language relied upon by the Court of Appeal does not support prospective application of Proposition 47 (see *ante*) to *Kirk*-defendants because while a *Kirk*-defendant is certainly allowed to apply for Proposition 47 relief through section 1170.18, subdivision (a), *subdivision (m)* – "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant" – makes it clear

that a petition for recall of sentence is not the sole avenue available to *Kirk*-defendants in seeking Proposition 47 relief.

Under *Estrada* and *Kirk*, the reduction in punishment provided by the Act should be applied immediately in appellant's case. By contrast the recall provision in section 1170.18 provides disparate treatment and a less complete remedy than the revised statutes that reduce prior felony offenses to misdemeanors. Under the recall procedure, defendants who are eligible for resentencing under the Act are nevertheless subject to the trial court's discretion to deny resentencing upon a finding that resentencing under the new law "would pose an unreasonable risk of danger to public safety" and are saddled with a firearm prohibition should they be re-sentenced. (§1170.18, subds. (b), (k).) In comparison, *Estrada* mandates relief where appropriate and does not subject defendants to the discretionary test outlined in subdivisions (b) and (c) of section 1170.18 or to the firearm prohibition of subdivision (k).

A new statutory remedy is exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80.) When a statute *expressly disclaims* an intent to supplant other remedies, it is cumulative, not exclusive. (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 223 [when statute states

its remedies are in addition to any others that may be available, its remedies are nonexclusive].)

It is not unusual for a statutory scheme to create overlapping benefits. Here, Proposition 47 can be seen as creating overlapping benefits for defendants in the procedural posture of a *Kirk*-defendant, like appellant. *Kirk*-defendants who do not want to abandon their appeal, may raise the issue of Proposition 47 relief on appeal because of their presumptive right to retroactivity of an ameliorative statute. Or conceivably, a *Kirk*-defendant can file a writ of habeas corpus in the superior court, as did the petitioners in *Estrada* and *Kirk*. Restricting *Kirk*-defendants to the recall petition is not warranted.

DeHoyos's reliance on *People v. Noyan* (*"Noyan"*) (2014) 232 Cal.App.4th 657, is misguided. In *Noyan*, the defendant had pled guilty; sentence was imposed but execution was suspended and he was placed on three years' probation in each case and ordered to attend the drug court program. The defendant then violated probation several times until his probation was finally revoked. Although he appealed from the probation revocation, and not from his original judgment, he (incorrectly) argued in a petition for rehearing Proposition 47 applied retroactively to his case. (*Id.* at p. 672.) In a one-line statement, *Noyan*'s seemed to hold the petition

procedure in section 1170.18 precluded application of the retroactive provisions to a pending appeal, relying exclusively on *People v. Yearwood* (*"Yearwood"*)(2013) 213 Cal.App.4th 161). Appellant submits *Noyan* came to the right conclusion for the defendant, but the result was based entirely upon the wrong reason.

Although *Noyan* provides no discussion as to relevant dates or procedural facts, it is apparent the original judgment must have become final long before the petition for rehearing was filed, thus *not* implicating *Estrada* or *Kirk* relief, and the defendant erred in requesting such relief. In other words, the defendant in *Noyan* was a Group 3 defendant – a section 1170.18, subdivision (a) petitioner – since the time for filing an appeal from the original judgment had long passed and, of course, he would have to use the recall provision of section 1170.18, subdivision (a). By citing *Yearwood*, the *Noyan* court may have concluded that section 1170.18, likes its statutory relative section 1170.126, contained an implied savings clause such that relief would only be available by means of the petition process described in both statutes. But *Noyan* provides no authority or legal analysis to support this proposition and, in any event, it was totally irrelevant since the *Noyan* defendant was not in the same procedural posture of an *Estrada* or *Kirk* defendant, so such

determination was unnecessary and unwarranted. The holding in *Noyan*, therefore, is misguided and inapplicable to our issue.

By implication *DeHoyos*, by citing to *Noyan*, relied upon the holding in *Yearwood*. *Yearwood* is also inapposite. *Yearwood* concerned the retroactivity of the earlier adopted Proposition 36 which "amended the Three Strikes law so that an indeterminate life sentence may only be imposed where the offender's third strike is a serious and/or violent felony or where the offender is not eligible for a determinate sentence based on other disqualifying factors. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)" (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 596, fn. omitted.) And indeed, the *Yearwood* court concluded section 1170.126 "operates as the functional equivalent of a saving clause[,]" given "[t]he voters intended a petition for recall of sentence to be the sole remedy available under the Act for prisoners who were serving an indeterminate life sentence imposed under the former three strikes law on the Act's effective date without regard to the finality of the judgment." (*People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 172.) This is the issue before this Court in *Conley*.

The reasoning of the *Yearwood* decision is flawed. Instead of addressing the heart of the *Estrada/Kirk*, the court in *Yearwood* thought it controlling that the sentence-recall provision did not say it applied only to

prisoners whose judgments were final before the Act's effective date. (*Yearwood, supra*, at p. 175.) But that backwards-reasoning analysis has never been the test for determining the intent behind an enactment. Indeed, legislation seldom makes statements like that (i.e., "This provision applies only to the persons who are described herein," as in *Pedro T.*), and the very most that can be said for this factor (putting aside the express statements of intent found in Proposition 47 itself) is that by not addressing the question, the initiative leaves the voters' intent ambiguous. Hence, this Court should disregard both *Noyan* and *Yearwood*.

3. Appellant's Position Is More In Harmony With The Electorate's Intent.

Construing the Act to apply retroactively to both *Estrada* and *Kirk* defendants and not limiting *Kirk*-defendants to the recall process makes sense given the electorate wanted it to be liberally construed to effectuate its purpose. Indeed, the courts have been instructed to "broadly" and "liberally" construe Proposition 47 to accomplish its purposes. (Prop 47, §§ 15, 18). Section 18 of the Proposition states "Liberal Construction. This act shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen Elec. (Nov. 4, 2014) Text of Proposition 47, § 18, p. 74.) It also makes sense in that it helps promote the goal of the initiative by stopping as soon as possible the expensive warehousing of individuals for non-violent crimes such

as minor property offenses. Applying Proposition 47 retroactively to *Kirk*-defendants would sooner meet the goals of the Act.

It further makes sense in light of section 1170.18, subdivision (m), which reads that "[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." This subsection shows that the sentencing remedy under section1170.18 is not exclusive and it does not preclude appellant, whose conviction is not yet final on review, from also taking advantage of the ameliorative changes to the drug possession statute listed in Proposition 47. In this context, section 1170.18 should be seen as expanding, not restricting, the rights of *Kirk*-defendants.

Conversely, denying retroactive application of the legislative changes made by Proposition 47 and requiring *Kirk*-defendants to rely only on the section 1170.18 recall procedure would increase spending for legal representation, e.g., for filing and litigating sentence-recall petitions and for judicial (and support staff) time required to decide such petitions. This would subvert the intent of the voters to maximize savings from reduced incarceration for non-serious and non-violent offenders and to channel that money into designated education and crime-prevention programs.

In California jurisprudence, as mentioned *ante*, no other enactment has served not only to ameliorate sentences, but also to provide a mechanism for

petitioning for reduction of sentencing (under certain conditions) (see also Proposition 36, § 1170.126), *and also* to mitigate, by "de-felonizing" same, final judgments, many of which have been *long* since been final (§ 1170.18, subds. (f)-(h)). In the typical *Estrada-Kirk* circumstance whereby a penalty is decreased and there is no savings clause, then any individual whose prosecution is pending (*Estrada*) or whose judgment is not yet final (*Kirk*) is entitled to the ameliorative benefit. (See, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301; *People v. Rossi* (1976) 18 Cal.3d 295, 299; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 765, 767-768.)

But here the legislative scheme is unprecedented and is *far more* ameliorative: the proposition added a petitioning process to permit current inmates (and probationers and parolees) whose judgments were final to seek a reduction not only in sentence but in severity of condemnation (felony to misdemeanor) ***and*** it provided a previously unheard of mechanism for former felons whose judgments may be decades old to reduce their felon status by a similar, though slightly different, process. It is unreasonable to conclude the electorate would have enacted such a far reaching magnanimous benefit and, notwithstanding such an intent, specifically desire to deny *Kirk*-defendants the amelioration which they would have received had the electorate not been so very magnanimous.

Appellant's interpretation of the language of section 1170.18 is straightforward, coherent, and neither redundant nor absurd. In the arguments *ante*, appellant has explored in greater depth the Act's arguments and analysis than did the Court of Appeal and has argued that the detailed context favors her position. Given the objectives of Proposition 47, the plain language of section 1170.18, especially subdivision (m), and absent an explicit abrogation of *Estrada-Kirk* or a specific statement that section 1170.18 provides the sole and exclusive remedy under the Act, it is *not* reasonable to find the "currently serving a sentence" language was meant to include *Kirk*-defendants or that section 1170.18 was meant to be an exclusive remedy to *Kirk*-defendants.

F. The Doctrine Of Lenity Applies Here Should This Court Find Ambiguity In the Electoral Intent.

To the extent the language of the Act and the electorate's intent may be found to be ambiguous in regard to whether nonfinal judgments are entitled to *Estrada/Kirk* retroactive application of the mandatory sentencing provisions of Health and Safety Code section 11377 (and other revised statutes reducing prior felonies to misdemeanors under the Act), then the rule of lenity requires rejection of any contention section 1170.18 – without so stating – somehow provides the exclusive remedy for cases pending final judgment.

As a first step in determining whether lenity should be applied, in resolving an ambiguity, a court is "guided by well-settled principles of

statutory interpretation. 'When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.' [Citations.]" (*People v. Davis* (1981) 29 Cal.3d 814, 828; see also *Cleveland v. United States* (2000) 531 U.S. 12, 25 [121 S.Ct. 365, 148 L.Ed.2d 221] [refusing to "choose the harsher alternative" sought by government]); *United States v. Bass* (1971) 404 U.S. 336, 348 [92 S.Ct. 515, 30 L.Ed. 2d 488].)

In application of a second step, appellant acknowledges the rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. *(People v. Manzo* (2012) 53 Cal.4th 880, 889, citing *People v. Cole* (2006) 38 Cal.4th 964, 986.) Rather, the rule applies " 'only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.' " (*Ibid.,* citing *People v. Avery* (2002) 27 Cal.4th 49, 58, emphasis omitted; see also *People v. Nuckles* (2013) 56 Cal.4th 601, 611.) Although this Court's jurisprudence has modified "ambiguity" with "egregious," such modification, as demonstrated below, has a tortured history

and may be questioned. Regardless, any ambiguity, even modified as "egregious," in essence, means that " 'the rule of lenity is a tie-breaking principle, of relevance when " 'two reasonable interpretations of the same provision stand in relative equipoise. . . .' " ' [Citation.]" (*People v. Manzo, supra,* 53 Cal.4th at p. 889.)

In 1974, in *Huddleston v. United States* (1974) 415 U.S. 814, 819 [94 S.Ct. 1262, 39 L.Ed.2d 782], the Supreme Court of the United States faced the question regarding the maxim that an ambiguity in a criminal statute is to be resolved in favor of the defendant. The court held, "We perceive no grievous ambiguity or uncertainty in the language and structure of the Act." (*Id.* at p. 831.) There was no citation or explanation for the adjective "grievous."

The first California case to cite this language was *People v. Avery, supra,* 27 Cal.4th 49, 58: "As Witkin explains, 'The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.' (1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.)" And this use of "egregious" has continued to the present, with italic emphasis first introduced in a one-justice concurrence by Justice Baxter in *People v. Arias, supra,* 25 Cal.4th 169, 189 (conc. opn., Baxter, J.)

It is unlikely that a Witkin editor just chose to insert "egregious" into the Witkin text, and that is not what happened. Witkin, California Criminal Law (2d ed. 1999 Supp.), Introduction to Crimes, section 28, pages 36-37,[14] cites to *Muscarello v. United States* (1998) 524 U.S. 125 [118 S.Ct. 1911, 1919, 141 L.Ed.2d 111], where the court again referred to "grievous ambiguity." The Witkin editor chose a synonym "egregious," but is "grievous" or "egregious" more pejorative? That prompts the question what does "grievous" mean in the context of "ambiguity," or more important, its synonym, "egregious" in California law?

The usage of "grievous" has continued in the United States Supreme Court, but with added, more refined meaning.[15] In *Chapman v. United States* (1991) 500 U.S. 453, 463, [111 S.Ct. 1919, 114 L.Ed.2d 524], defendants

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[14]This particular Witkin Supplement has been superceded, is out of date, and is not readily available on line. Thus, it is attached as Exhibit 1 as a "citable material that [is] not readily available." (Cal. Rules of Ct., rule 8.520(h).)

[15]A legal term such as "grievous"or "egregious," in isolation without explanation, may be misleading. For example, the off-cited standard of "reasonable probability" in *Watson* error (*People v. Watson* (1956) 46 Cal.2d 818, 837) may be mistaken for something like preponderance. But the standard is far more favorable to the defense than many may first suspect: "a 'probability' in this context does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics original, cited in, e.g. *People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

The point here is that "grievous/egregious" is not nearly as severe as may first appear at first blush.

argued that excluding the weight of the LSD blotters when determining a sentence was consistent with established principles of statutory construction, arguing in part based on the rule of lenity. The court began, *ibid.*, by citing to *Huddleston, supra*. The *Chapman* court then continued:

> such that even after a court has " 'seize[d] every thing from which aid can be derived,' " it is still "left with an ambiguous statute." *United States v. Bass,* 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (quoting *United States v. Fisher,* 2 Cranch 358, 386, 2 L.Ed. 304 (1805)). "The rule [of lenity] comes into operation at the end of the process of construing what [the legislative body] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." [Citations.]

(*Chapman, supra*, 500 U.S. at p. 463.) The court held that the statutory language and structure did not produce a result "so 'absurd or glaringly unjust,'" [Citations], as to raise a "reasonable doubt" about the [legislature's] intent [Citation.]." (*Id.* at pp. 463-464.)

Before applying the legal principles to the circumstances, appellant returns briefly to United States Supreme Court case law which is relevant. In *United States v. Santos* (2008) 553 U.S. 507, 513-514 [128 S.Ct. 2020, 170

L.Ed.2d 912](*Santos*), there were two interpretations of a money-laundering statute which were both coherent, and under neither were there provisions redundant nor rendered utterly absurd. The court in an opinion by Justice Scalia did *not* use the "grievous ambiguity" language but concluded, "[u]nder a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. [Citations.]" (*Id.* at p. 514.) (Among the omitted citations was *United States v. Bass*, *supra*, 404 U.S. at pages 347–349, also cited by the court, but not as authority, in *Huddleston, supra*, 415 U.S. 814, when the court first introduced the "grievous language.") Justice Scalia also emphasized that "this venerable rule (of lenity)" not only vindicates the fundamental principle of notice (not relevant here), but *very* relevant here, "also places the weight of inertia upon the party that *can best induce [the legislative body] to speak more clearly and keeps courts from making criminal law in [the legislative body's] stead*." (*Santos, supra*, 553 U.S. at p. 514, emphasis added.)

Here, a full appreciation of *Nuckles, supra,* 56 Cal.4th at p. 611, is appropriate: "'That rule generally requires that "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation. But . . . 'that rule applies "only if two reasonable interpretations of the statute stand in relative

equipoise." [Citation.]' [Citations.]" [Citations.]' [Citation.]" Therefore, a "grievous" ambiguity cannot be worse a standard than being in equipoise. If two interpretations are equipoise, they are in balance – one cannot determine which prevails. *Nuckles* concluded, "'[A]lthough true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent.'" (*Id,* at pp. 611-612, citing to *People v. Avery, supra,* 27 Cal.4th at p.49, 58.) The French-turned-American historian Jacques Barzun has been quoted as having said, "To understand America, one must first understand baseball." Perhaps Justice Scalia had that in mind when rather than a Latin derivation such as "equipoise," he employed the baseball vernacular, "the tie goes to the runner," raised to the legal declaration, "the tie goes to the defendant," and, hence, appellant should prevail.

If there be any ambiguity, the reasonable interpretations of the same provision – "currently sentenced" – are in relative equipoise. Respondent's – and the court's below – interpretation is that "currently sentenced" means judgment has been imposed (or probation granted) such that the defendant is in custody, actual or constructive, whereas appellant's interpretation is that "currently sentenced" is a shorthand phrase employed in section 1170.18, subdivision (a) to distinguish defendants in that category from those whose

who have "completely served" their sentences and may seek relief under section 1170.18, subdivision (f), a similar but distinctly different scheme with different procedures and results. When both interpretations are considered in juxtaposition with *Estrada-Kirk* jurisprudence and the vastly magnanimous effect of the Proposition, then appellant's interpretation is the most reasonable, but at worst, the two interpretations are in equipoise, "the tie must go to the defendant," i.e., lenity must favor appellant. (See *e.g. People v. Franco* (2009) 180 Cal.App.4th 713, 724-725 [statute ambiguous, justifying adoption of interpretation more favorable to defendant]; *People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1194-1196 [same]; *In re Rosalio* (1995) 35 Cal.App.4th 775, 780-781 [same].)

CONCLUSION

Under the Act, the amendment to Health and Safety Code section 11377 mitigates punishment for certain individuals who do not have disqualifying priors. The right to be resentenced under *Estrada/Kirk* is a right available to a defendant whose judgment is not yet final. Under *Overstreet*, the Legislature must be deemed to have been aware of the *Estrada/Kirk* rule at the time it enacted section 1170.18 and to have enacted the statute in light of those decisions. For this reason, appellant's case should be remanded to the trial court and the conviction for possession of a controlled substance be reduced to a misdemeanor under the *Estrada/Kirk* rule, after a formal determination of no disqualifying priors.

Dated: 1·21·16

Respectfully submitted,

LESLIE ANN ROSE
APPELLATE DEFENDERS, INC.

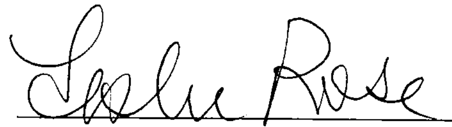
Attorneys for Appellant

CERTIFICATION OF WORD COUNT

I, Leslie Rose, hereby certify that, according to the computer program used to prepare this document, appellant's opening brief on the merits contains10,891 number of words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 21, 2016 in San Diego, California.



Leslie Rose
Staff Attorney
State Bar No. 106385

INDEX OF EXHIBIT

Exhibit 1 Citable material the [is] not readily available . . . . 1 - 2

EXHIBIT "1"

Citable material that [is] not readily available

applied in construing Govt.C. 3063, imposing duty on district attorney to prosecute accusation against public official].

(d) [§26] Rule of Ejusdem Generis.

See *Walker v. Meehan* (1987) 194 C.A.3d 1290, 1297, 240 C.R. 171, quoting the text.

(e) [§27] Rule of Expressio Unius Est Exclusio Alterius.

See *People v. Superior Court (Romero)* (1996) 13 C.4th 497, 522, 53 C.R.2d 789, 917 P.2d 628, Supp., infra, §1515H [doctrine not applied, in part because statute specifying exception did not purport to be exhaustive enumeration of court powers]; *People v. Trippet* (1997) 56 C.A.4th 1532, 1550, 66 C.R.2d 559, citing the text; *People v. Anzalone* (1999) 19 C.4th 1074, 81 C.R.2d 315, 969 P.2d 160, Supp., infra, §1747A [specification in P.C. 2962(e)(2)(D) that mentally disordered offender statute specifically includes robberies committed by using deadly or dangerous weapon implies that robberies committed without such use are not included].

(f) Construction Favorable to Defendant.

(1) [§28] General Rule.

See *In re Christian S.* (1994) 7 C.4th 768, 780, 30 C.R.2d 33, 872 P.2d 574, Supp., infra, §241 [P.C. 188 definition of malice construed to require wrongful intent, not merely intent to kill]; *People v. Alberts* (1995) 32 C.A.4th 1424, 1426, 1428, 37 C.R.2d 401 [attempted arson statute (P.C. 455), which provides for lesser punishment, prevails over general attempt statute (P.C. 664), which provides for greater punishment]; *United States v. Granderson* (1994) 511 U.S. 39, 114 S.Ct. 1259, 1262, 127 L.Ed.2d 611, 619 [rule of lenity applied where statute susceptible to at least three interpretations; "Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended"]; *People v. Clark* (1996) 45 C.A.4th 1147, 1155, 53 C.R.2d 99, Supp., infra, §999A ["loaded," as used in Health & Saf.C. 11370.1(a) (possession of controlled substance while armed with loaded firearm), would be construed in ordinary sense to require that shell be in firing position, rather than in suggested unusual sense under which firearm would be loaded if shell was placed in storage compartment attached to firearm].

On the other hand, the existence of a statutory ambiguity is not enough to warrant application of the general rule, because most statutes are ambiguous to some degree. The rule applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule. (*Musca-*

ello v. United States (1998) 524 U.S. 125, 118 S.Ct. 1911, 1919, 141 L.Ed.2d 111.)

(2) [§29] **Exceptions.**

See *In re Ramon A.* (1995) 40 C.A.4th 935, 941, 47 C.R.2d 59 [rule that statute should be construed to implement legislative purpose prevails over rule that statute should be construed favorably to defendant].

The policy that a penal law will be construed as favorably to criminal defendants as the language reasonably permits "generally comes into play only when the language of the penal law 'is susceptible of two constructions.' " (*People v. Gardeley* (1996) 14 C.4th 605, 622, 59 C.R.2d 356, 927 P.2d 713, Supp., infra, §1251B [declining to apply rule in construing provisions of Street Terrorism Enforcement and Prevention Act (STEP; P.C. 186.20 et seq.)]; see *People v. Prothero* (1997) 57 C.A.4th 126, 131, 66 C.R.2d 779 [rule of lenity applies when court is confronted with two equally plausible constructions, but not when (as here) defendant's construction is not plausible].)

Elec.C. 29740 was repealed and replaced in 1994 by Elec.C. 18620, which contains nearly identical language.

(h) [§31] **Construction Favoring Validity.**

See *People v. Simon* (1995) 9 C.4th 493, 37 C.R.2d 278, 886 P.2d 1271, Supp., infra, §1032 [court avoided construction of Corporate Securities Law that would have criminalized conduct on basis of events happening after conduct had occurred, because such construction would be both unusual and of doubtful constitutionality]; *People v. Superior Court (Romero)* (1996) 13 C.4th 497, 513, 53 C.R.2d 789, 917 P.2d 628, Supp., infra, §1515H [rule applied in context of "Three Strikes" sentencing law]; *People v. Birks* (1998) 19 C.4th 108, 135, 77 C.R.2d 848, 960 P.2d 1073, Supp., infra, §2938 [when reasonably possible, courts avoid statutory and constitutional interpretations that raise serious and doubtful constitutional questions].

Correction: Page 41, line 9, date of *Davis* case should be 1968.

(j) [§33] **Legislative History.**

See *People v. King* (1993) 5 C.4th 59, 65, 19 C.R.2d 233, 851 P.2d 27, Supp., infra, §1306 [amendment of CYA eligibility provision of Welf.C. 1731.5 as legislative response to prior case interpretation of statute]; *In re Christian S.* (1994) 7 C.4th 768, 781, 30 C.R.2d 33, 872 P.2d 574, Supp., infra, §241 [Penal Code amendments abolishing defense of diminished capacity; no reference in legislative history to elimination of imperfect self-defense]; *People v. Ledesma* (1997) 16 C.4th 90, 95, 65 C.R.2d 610, 939 P.2d 1310 [in light of legislative history, "may" in P.C. 12022.5(d) (firearm use enhancement) is mandatory, not discretionary].

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Case Name: People v. Veronica L. Dehoyos   Supreme Court No. S228230
Court of Appeal No. D065961
Superior Court No. SCD 252670

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APPELLANTS OPENING BRIEF ON THE MERITS

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San Diego, CA 92112-2724

Court of Appeal Fourth Appellate
District, Division One
750 B Street, Suite 300
San Diego, CA 92101

William C. Sharp
Alternate Public Defender
450 B Street, Suite 1200
San Diego, CA 92101

Veronica L. Dehoyos
53620 Avenida Velasco
La Quinta CA 92253

California Supreme Court
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Will Bookout	Will Bookout
(Typed Name)	(Signature)