IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S236728
Plaintiff and Respondent,	)	
	)	
v.	)	(Court of Appeal No.
	)	B260774)
JAMES BELTON FRIERSON,	)	
	)	(Los Angeles County Superior
Defendant and Appellant.	)	Court No. GA043389)
	)	

APPELLANT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Under Proposition 36 which provides for the possibility of re-sentencing for defendants not convicted of a current serious offense, what standard of review does the recall court apply in making factual determinations that the defendant engaged in conduct which disqualifies him from eligibility for Proposition 36?

STATEMENT OF THE CASE

In 2001, appellant was convicted of two counts of stalking (Pen. Code, § 646.9, subd (a).) Based on the additional finding that he had qualifying "strike" prior convictions (Pen. Code, §§ 667, 1170.12), he was sentenced under the Three Strikes Law to an indeterminate term of twenty-five-years-to-life on each count to run consecutively. (ACT[1] 6-8) The appellate court, on appellant's direct appeal from this conviction, in case number B149977, held that Penal Code section 654 precluded separate sentencing for the two counts. (ACT 24-27) On issuance of the remittitur, appellant's sentence was changed to a sentence of twenty-five years to life on one count, with sentence on the second count stayed. (ACT 10)

Following the November, 2012, enactment of Proposition 36 by the voters, appellant filed a petition for recall of the third "strike" sentence. (ACT 33–34) The prosecution initially filed an opposition, stating that, in its opinion, appellant was unsuitable because he posed an unreasonable risk of danger to the public. (ACT 35-39) Appellant filed a reply arguing that he was suitable for re-sentencing. (ACT 41-46)

The prosecution then filed a revised opposition contending that appellant was ineligible for re-sentencing, as well as unsuitable, because, at the time of the offense, he demonstrated an intent to cause great bodily injury. (ACT 77-90) Appellant filed a

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[1]/ The record on appeal consists of a Clerk's Transcript, an Augmented Clerk's Transcript, and an Augmented Reporter's Transcript. These will hereinafter be referred to as "CT," "ACT," and "ART," respectively.

second reply to this revised opposition. (ACT 93-95)

The prosecution then filed exhibits consisting of portions of the reporter's transcript of testimony from appellant's trial on the charges which were part of the record on appeal in case B149977. (ACT 100-190)

Following its consideration of these pleadings and exhibits and a hearing at which it heard argument, the court denied the petition on the basis of its factual finding, using a standard of "preponderance of the evidence," that appellant intended to cause great bodily injury to the victim at the time of the stalking offense, and thus was ineligible for recall and re-sentencing under Proposition 36. (Pen. Code, §§ 667, subd. (c)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) (CT 19-24; ACT 195-196, 199-201; RT 2-8)

Appellant timely filed a Notice of Appeal from the denial of his post-judgment, statutory motion. (CT 25) On July 20, 2016, the Court of Appeal issued its published opinion affirming the recall court's order denying the petition and holding that the standard of proof for the eligibility determination is preponderance of the evidence. On August 5, 2016, the Court of Appeal modified its decision without changing the judgment or its holding regarding the standard of proof.

On August 22, 2016, appellant's Petition for Review was filed. Thereafter, on October 19, 2016, this Court granted review.

STATEMENT OF FACTS

The stalking case was based on letters sent by appellant to his wife from prison where he was serving a sentence on an earlier domestic violence case involving the two of them. (ACT 3)

His wife had written to appellant telling him that she was ending the relationship. (ACT 110) He then wrote several letters to her. In some, he said that he would look for her and "track her down." (ACT 112-114, 116, 118-119, 125-126) In one, he told her that she should run. (ACT 112) In another, he told her that he was going to come looking for her and that he would not let her have another man or husband. He wrote that, because she had "hurt" him, he would "hurt" her. (ACT 113-114) In a third letter, he asked her if she was with someone else already. (ACT 115) He wrote that he loved her and would not let her have another man in her life if it wasn't him. (ACT 116) In one letter, he wrote that he would kill her for causing him so much pain. (ACT 117)

After serving appellant with divorce papers, his wife received a letter from him telling her that he couldn't hate or forget about her but would do something bad to her because he couldn't live without her. (ACT 122) He told her that she was his wife for life, and that he would "get" her for hurting him so bad. (ACT 123, 138)

However, appellant also wrote that he was not going to hit her, but merely try to talk her into restarting their relationship. (ACT 115-116) He wrote that he loved her and was trying to hold onto that without thinking of bad things to do to her for hurting him.

(ACT 117) He wrote that he couldn't just let her leave him and let someone else take her from him. He was going to put up a fight for her. (ACT 126) He said that, he knew that she still loved him, and that, when he got out, they would have sex together, and then, if she still didn't want him, he would let her go. (ACT 130, 133-134)

ARGUMENT

THE RECALL COURT ACTED IMPROPERLY IN USING ONLY A PREPONDERANCE OF THE EVIDENCE STANDARD AND FINDING THAT APPELLANT INTENDED TO INFLICT BODILY HARM ON HIS WIFE WHICH RENDERED HIM INELIGIBLE FOR RECALL AND RESENTENCING UNDER PROPOSITION 36

A. Introduction

Proposition 36 amended the Three Strikes Law such that life sentences are reserved for "cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168; see also *People v. Johnson* (2015) 61 Cal.4th 674, 681.) One of the "enumerated disqualifying factor[s]" is that "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person. . . . ." (Pen. Code, §§ 667.1 subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii)[2]; see also *People v. Johnson*, *supra*, 61 Cal.4th at p. 681.)

Proposition 36 further provided a procedure for prisoners already serving a third strike sentence to seek resentencing in accordance with the new rules. (*Id.* at p. 682.) Penal Code section 1170.126 provides the mechanism for defendants with qualifying offenses to obtain a reduction of their sentences. Section 1170.126 uses identical criteria

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[2]/ These two subdivisions are identical. For convenience, they will be jointly referred to hereafter as "subdivision (iii)."

for resentencing eligibility as the new law does for second strike sentences, referring expressly to the same statutes. (*Ibid.*) It contains, however, an additional provision granting the trial court discretionary authority to deny resentencing if resentencing would pose a danger to the public. (Pen. Code, § 1170.126, subd. (f); *People v. Johnson*, *supra*, 61 Cal.4th at p. 691.)

Thus, with the exception of the recall court's discretion to deny resentencing on the basis of dangerousness, the new provisions are intended to apply in the same way going backward and forward and provide identical sentences for the same offenses. (*Id.* at p. 687.) A stumbling block for recall courts in ruling on petitions filed under Proposition 36 has been how to determine retrospectively whether a conviction was based upon non-elemental conduct listed in subdivision (iii), and thus, is ineligible for recall.

In this case, as noted earlier, appellant was convicted of stalking. (Pen. Code, § 646.9, subd. (a).) Stalking is not a violent or serious felony and is punished as a "wobbler," unless the defendant has prior similar offenses or violates a restraining order. (*Ibid.*) An element of stalking is the making of a credible threat that is intended to place the victim in fear. The threat required does not require that the perpetrator actually intend to kill the victim or to cause great bodily harm to him or her.

The recall court here, however, reviewed evidence from appellant's trial on the charges and made a factual finding that appellant intended to cause great bodily harm to the victim. It did so using the preponderance standard of proof. (CT 19-24; ACT 195-

196, 199-201; RT 2-8) The use of a mere preponderance standard was error.

"'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.)

"The function of a standard of proof ... is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*Addington v. Texas* (1979) 441 U.S. 418, 423 [60 L. Ed. 2d 323, 99 S. Ct. 1804], quoting *In re Winship* (1970) 397 U.S. 358, 370 [25 L. Ed. 2d 368, 90 S. Ct. 1068] (conc. opn. of Harlan, J.).) "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Ibid.*)

Where society has a minimal concern with the outcome of a case, as in a civil case involving a monetary dispute, the burden of proof is a mere preponderance of the evidence. "The litigants thus share the risk of error in roughly equal fashion." (*Ibid.*; see also *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320 ["A preponderance of the evidence standard ... 'simply requires the trier of fact to believe that the existence of

a fact is more probable than its nonexistence ....1'"].) On the other end of the spectrum, where the interests of society and a criminal defendant "are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." (*Addington v. Texas*, *supra*, 441 U.S. at pp. 423–424, fn. omitted; see also CALCRIM No. 220 ["Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."].)

Under Proposition 36, for cases going forward after the operative date of the initiative, findings of fact that make the defendant ineligible for second "strike" sentencing even though his current offense is not a serious felony, must be pled and proven by the prosecution in the criminal case to the jury using the beyond reasonable doubt standard as with any other elements of the offense. (Pen. Code, § 667, subd. (e)(2)(C); 1170.12, subd. (c)(2)(C).) For retroactive application, however, Penal Code section 1170.126 does not mention a pleading and proof requirement, and this Court and others have interpreted recall as not requiring such. (*People v. Conley* (2016) 63 Cal.4th 646, 659; see also *People v. Chubbuck* (2014) 231 Cal.App.4th 737, 747; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 801–803; *People v. Guilford* (2014) 228

Cal.App.4th 651, 656–658; *People v. Bradford*, (2014) 227 Cal.App.4th 1322, 1337; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1315–1316; *People v. White* (2014) 223 Cal.App.4th 512, 526–527.) As this Court noted, for cases arising before the Act, "prosecutors may have had no reason to plead and prove the new disqualifying factors in a particular case." (*In re Conley, supra*, 63 Cal4th at pp. 659-660.) If a pleading requirement was imposed on the prosecution in cases in which the defendant was seeking retroactive application of the Act, the defendant might receive a second strike sentence without the prosecution ever having had occasion to plead and prove that the defendant was disqualified from receiving that sentence. Thus, a pleading requirement would undermine the voter's intent in passing the reform initiative but providing limits on its application in cases where certain factors were present.

However, that the initiative did not impose a pleading requirement because that would undermine the voters' intent to bar relief to those who committed certain crimes in certain manners does not dictate how the additional facts will be determined or what the burden of proof is for that determination. Neither for cases going forward nor for cases seeking retroactive application does the initiative specifically provide what the burden of proof is. The pleading requirement going forward is assumed to impose a beyond reasonable doubt standard because that is the standard applicable to the proof of all other elements in a criminal case. For retroactive application, the lack of mention of a standard has led to all courts but one interpreting the act to require only a preponderance standard

either because Evidence Code section 115, as noted above, provides that when no standard is mentioned, preponderance is assumed, or because, since recall under the Act is an act of leniency to reduce a previously-imposed sentence, there is no constitutional requirement that beyond reasonable doubt apply. (See e.g., *People v. Perez* (2016) 3 Cal.App.5th 812, 821-822; *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 804-805; *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1334-1337; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1040.)

But, appellant here is not arguing that the constitutions impose a beyond reasonable doubt standard; nor did the court in *People v. Arevalo* (2016) 244 Cal.App.4th 846. Rather, it is because the interests of society and the defendant in not incarcerating for life anyone who did not commit a crime that is neither serious nor violent and did not involve a specific disqualifying factor is so high that errors in the determination cannot be tolerated and the burden should be solely on the court making the finding.

As the *Arevalo* court explained, due process rights attain when an action may deprive an individual of a liberty or property interest. (See *Id.* at p.850; see also *Mathews v. Eldridge* (1976) 424 U.S. 319, 332 [47 L. Ed. 2d 18, 96 S. Ct. 893].) In this context, due process requires that the standard of proof applied to a situation meet the constitutional minimum of fundamental fairness. To assess whether a burden meets this standard, courts look to three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest, and (3) the countervailing governmental interest

supporting the use of the challenged procedure. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 850.) In addition, the standard of proof is a crucial component of the legal process whose primary function is to minimize the risk of erroneous decisions. (*Ibid.*)

Arevalo recognized that the defendant's liberty interest at a recall proceeding is somewhat diminished because at issue is whether to ameliorate a previously lawfully imposed sentence, but concluded that this diminished interest was counterbalanced by the substantial amount of future prison time that might be affected by the proceeding. (*Id.* at p. 851.) *Moreover*, the risk of potential error caused by the lack of incentive at trial to litigate the unpleaded allegations was high, and the countervailing governmental interest was slight given that a finding of eligibility does not deprive the prosecution of the opportunity to provide new evidence at a hearing on the defendant's dangerousness. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 852.) Based on all of this, the court correctly concluded that a standard higher than a mere preponderance of the evidence should be used. (*Id.* at p. 852; see also *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1349-1350, conc. opn. of Raye, P.J..)

It went on to conclude that the standard should be beyond a reasonable doubt based upon the apparent intent of the electorate in enacting Proposition 36 to provide parity in the prospective and retrospective application of the ameliorative aspects of the scheme. In reaching this conclusion, the court relied on this Court's decision in *People*

v. Johnson, *supra*, 61 Cal.4th 674. (*People v. Arevalo*, *supra*, 244 Cal. App.4th at p.853.) As this Court noted in *Johnson*, "the parallel structure of the Act's amendments to the sentencing provisions and the Act's resentencing provisions reflects an intent that sentences imposed on individuals with the same criminal history be the same, regardless of whether they are being sentenced or resentenced. Both the sentencing scheme and the resentencing scheme provide for a second strike sentence if the current offense is not a serious or violent felony, and they set forth identical exceptions to the new sentencing rules. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126, subd. (e)(2), (3).)" (*People v. Johnson*, *supra*, 61 Cal.4th at p. 686.)

The *Arevalo* court emphasized this Court's statement that, "the parallel structure of the Act's sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories, unless the trial court concludes that resentencing would pose an unreasonable risk to public safety." (*Id.* at p. 687; *People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.) The use of a lesser standard of proof for the recall eligibility finding than that used to disqualify a defendant going forward, where the factor will be pleaded and proved beyond a reasonable doubt, could easily result in disparate treatment of defendants retrospectively. In *Arevalo* itself, the use of a preponderance standard resulted in the recall court finding that Arevalo was not eligible based upon its finding that he was armed with a firearm during the commission of his offense when the jury convicting him had found him not guilty of being in possession

of a firearm and had found not true an arming enhancement. Had those verdicts been reached today, the second strike sentence would have been required, but Arevalo was to be found ineligible for such treatment based on a lesser standard of proof. The *Arevalo* court found this to "violate *Johnson*'s 'equal outcomes' directive." (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.)

The recall determination is not a mere sentencing decision. The finding of an ineligibility factor is unlike findings of factors in mitigation or aggravation as those apply in sentencing decisions. Sentencing factors come into play when a court is exercising sentencing discretion; eligibility is not a discretionary determination. Eligibility is a question of law. (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1420-1421; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7.) As the *Arevalo* court observed, the eligibility determination is not like the ordinary sentencing or the discretionary suitability procedure under Proposition 36. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 851.) This is because the eligibility proceeding is backward-looking, and the issues addressed may not have been previously litigated at all. (*Ibid.*)

The *Arevalo* court's analysis, based largely on this Court's opinion in *Johnson*, is compelling. This Court should therefore follow it and hold that the standard to be used in recall eligibility determinations is beyond a reasonable doubt.

Dated: December 15, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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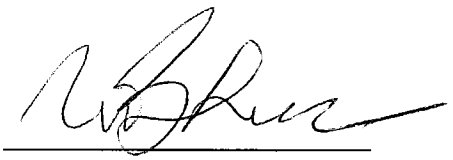

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WORD COUNT CERTIFICATION
People v. James Frierson

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 3,284 words.

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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On December 15, 2016, I served the within

OPENING BRIEF ON THE MERITS

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

Executed December 15, 2016 at Los Angeles, California.

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