In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSUE MORALES,** **Defendant and Appellant.**

Case No. S228030

Fourth Appellate District, Division Three, Case No. G051142
Orange County Superior Court, Case No. 13WF3934
The Honorable Christopher Evans, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether excess custody credits can be used to reduce or eliminate one-year Proposition 47 parole under Penal Code section 1170.18, subdivision (d).

INTRODUCTION

In March 2014, defendant and appellant Josue Morales pleaded guilty to possession of a controlled substance, and the trial court imposed a 16-month prison term. He was released to three years of postrelease community supervision (PRCS) in August 2014. After Proposition 47 was passed in November 2014, Morales filed a petition to be resentenced to a misdemeanor. The trial court granted the petition, resentencing Morales to a shorter term of imprisonment and imposing Proposition 47 parole, which, under Penal Code section 1170.18, subdivision (d), extends for one year.[1] The court rejected Morales' argument that because the time he had already spent in custody exceeded his new, shorter custody term, excess custody credits under section 2900.5 should be applied to reduce or eliminate his Proposition 47 parole term. On appeal, the Court of Appeal reversed, holding that excess credits under section 2900.5 apply to Proposition 47 parole, and that Morales' parole term should therefore be reduced by the amount of custody time he served that was in excess of his new custody term.

The Court of Appeal's opinion should be reversed. Under the plain language of section 1170.18, subdivision (d), a person serving a sentence, who is resentenced to a misdemeanor under subdivision (b), must serve a one-year parole term if the trial court, in its discretion, decides to impose parole. Nothing in the statute provides for credits against the parole term,

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

and any such credits would conflict with the mandatory statutory language requiring a one-year parole term. To the extent there is any ambiguity, the issue is definitively resolved by the voter information guide, which promised voters that resentenced defendants would be required to serve one year of parole—a guarantee that was likely critical to voters' decision to enact Proposition 47. The Court of Appeal's contrary view was in error.

BACKGROUND

A. Statutory Background

This case concerns the interaction between the resentencing provisions of Proposition 47 and two other statutory schemes: the general custody credit provisions of Penal Code section 2900.5, and the Public Safety Realignment Act's provisions for PRCS.

1. Proposition 47

Proposition 47, the "Safe Neighborhoods and Schools Act," was enacted on November 4, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) For offenders meeting statutory criteria, Proposition 47 converted certain drug and theft-related offenses, which had previously been designated as either felonies or "wobblers," into misdemeanors. (*Id.* at p. 1091.)[2] It also added to the Penal Code section 1170.18, which controls the retroactive applicability of this change to those sentenced before Proposition 47's enactment.

Section 1170.18 distinguishes between those who have already completed their felony sentences, and those still serving those sentences. Under section 1170.18, subdivision (f), an eligible person who has "completed his or her sentence" for an offense that Proposition 47 changed

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[2] A "wobbler" is a crime that "can be punished as either a felony or a misdemeanor." (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1091.)

from a felony to a misdemeanor may file an application to have the felony conviction designated as a misdemeanor. (§ 1170.18, subd. (f); see *People v. Shabazz* (2015) 237 Cal.App.4th 303, 310-311.) Subdivision (f) makes no mention of parole.

In contrast, resentencing proceedings for defendants "currently serving" a felony sentence are covered by subdivisions (a) through (e). When such a defendant petitions for resentencing, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subds. (a), (b).) Subdivision (d) specifies that, if resentencing is granted, the defendant "shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (§ 1170.18, subd. (d).) Subdivision (e) states that "[u]nder no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." (§ 1170.18, subd. (e).) And subdivision (m) provides that, "[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or the applicant." (§ 1170.18, subd. (m).)

2. Custody credits under Penal Code section 2900.5

Section 2900.5, which was enacted in 1971, states that:

> (a) In all felony and misdemeanor convictions, ... when the defendant has been in custody, ... all days of custody ... credited to the period of confinement pursuant to Section 4019, ... shall be credited upon his or her term of imprisonment.... If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment

> imposed, and thereafter the remaining days, if any, shall be applied to the fine.... [¶]
>
> (c) For the purposes of this section, 'term of imprisonment' includes any ... period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge....

A criminal defendant is entitled to actual custody credit for time served in county jail before sentencing for the same conduct. (§ 2900.5, subd. (a); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) In general, section 2900.5 credits apply against both the period of incarceration and the period of parole. (§ 2900.5, subds. (a), (c); *In re Ballard* (1981) 115 Cal.App.3d 647, 650; *In re Sosa* (1980) 102 Cal.App.3d 1002, 1006.) The legislative purpose was "to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than" defendants with greater wealth. (*In re Rojas* (1979) 23 Cal.3d 152, 156.) Such presentence excess custody credits are distinguished from presentence "conduct credits" which are earned by performing assigned labor and complying with rules and regulations. (§ 4019, subds. (b) & (c); see generally § 2900.5, subd. (a); *People v. Buckhalter*, *supra*, 26 Cal.4th at p. 30; *People v. Sage* (1980) 26 Cal.3d 498, 508-509.)

3. Parole and PRCS

Under the 2011 realignment legislation, including the Postrelease Community Supervision Act, those released from prison are subject to either parole (§ 3000 et seq.) or PRCS (§ 3450 et seq.). (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434.)

PRCS is reserved for those who do not fall into certain enumerated categories of high-risk offenders. (§ 3451, subd. (b); *People v. Armogeda*, *supra*, 233 Cal.App.4th at p. 434.) PRCS is mandatory, not discretionary,

and can last for up to three years. (§ 3451, subd. (a); *People v. Tubbs* (2014) 230 Cal.App.4th 578, 586.) Unlike when a person is on parole, the Department of Corrections and Rehabilitation has no jurisdiction over a person on PRCS, and a person cannot be returned to prison for a violation of PRCS. (§§ 3457, 3458; *People v. Espinoza* (2014) 226 Cal.App.4th 635, 639.)

B. Morales' Crime and Initial Sentence

Morales' crime and initial sentencing occurred before the passage of Proposition 47. In 2013, he was found in possession of heroin and a syringe. (CT 17.) On March 20, 2014, he pleaded guilty to possession of heroin in violation of Health & Safety Code, section 11350, subdivision (a). (CT 1-2, 8, 14-18; June 26, 2015, Court of Appeal slip opinion (Slip opn.), p. 2.)[3] On April 10, 2014, the trial court imposed a 16-month prison term. (CT 10-11, 22; Slip opn., p. 2.) Although Morales admitted to having prior prison terms and prior strikes (CT 14, 19), the trial court followed the plea agreement's recommendation to strike those priors. (CT 11, 21; RT 3-4 (Apr. 10).)[4] Morales was awarded 110 days of custody credits and 110 days of conduct credits, totaling 220 days. (CT 10.) In August 2014, he

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[3] Morales also pled guilty to possessing the syringe. (*Ibid.*) That conviction is not at issue here.

[4] The two Reporter's Transcripts (RT) in this case require some explanation. One RT, dated November 18, 2014, consists of six pages transcribing that date's morning and afternoon hearings in case number R-02612, the PRCS case number related to Morales' original conviction, superior court case number 13WF3934. The second RT, dated April 10, 2014 and November 18, 2014, consists of nine pages. The April 10 portion, found at pages one through six, contains Morales' original, pre-Proposition 47 sentencing. The November 18 portion, found at pages seven to nine, is the same transcript as the November 18 afternoon transcript in the other RT, but is preceded by a cover page bearing an erroneous case number (13NF3751).

was released from prison into PRCS for a period of three years. (Slip opn., p. 2.)

C. Morales' Proposition 47 Resentencing

After Proposition 47 passed, Morales, on November 18, 2014, filed a petition seeking to have his possession of heroin conviction reduced to a misdemeanor under section 1170.18, subdivision (a). (CT 24.) The court granted Morales' petition and recalled his felony sentence. The court resentenced him to 365 days in jail, with the entire amount credited as time served. (RT 5; CT 13.) The parties disagreed about whether Morales should also be sentenced to parole. (RT 7-8.) The People's position was that, in light of Morales' prior robbery conviction, "he should remain supervised" after release. (RT 8; see *ibid.* [referring to Morales' "211 strike"]; § 211 [robbery statute].) Morales objected to the supervision, saying that the "underlying sentence of 16 months" was "sufficient for the charge." (RT 7.) The court imposed one year of "parole pursuant to Penal Code section 1170.18(d)." (CT 13; Slip opn., p. 2.)

D. The Court of Appeal's Opinion

On appeal, Morales contended, among other things, that under section 2900.5, his excess custody credits, known as *Sosa* credits, should be applied against his parole term. (Slip. opn., pp. 2, 7; see *In re Sosa*, *supra*, 102 Cal.App.3d at p. 1006.)

The Court of Appeal agreed. (Slip opn., pp. 8-10.) The court noted that Proposition 47 instructs that a person resentenced under section 1170.18, subdivision (d) and not released from parole "'*shall* be subject to parole for one year.'" (*Id.* at p. 8.) The court interpreted this as meaning that such a person was subject to all preexisting background rules governing parole, including a "general rule" requiring that excess custody be credited towards a reduction in parole. (*Ibid.*) The court declined to

follow a published opinion of the Second District reaching the opposite conclusion. The Court of Appeal accordingly remanded the case to the trial court with instructions to recalculate Morales' parole period. (*Id.* at p. 11.) The Court of Appeal also ordered that excess credits be applied against Morales' fines. (*Id.* at pp. 10-11).[5]

On August 26, 2015, this court granted the People's petition for review in Morales' case, and granted and held the contrary case from the Second District. (See *People v. Hickman*, No. S227964.)[6]

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[5] Based on the Court of Appeal's opinion, on July 25, 2015, the trial court applied 16 months of excess custody credits, reducing Morales' parole period to eight months. Because the eight months had ended on June 18, Morales was immediately discharged from parole. The trial court also reduced Morales' sentence from 365 to 364 days—the maximum misdemeanor sentence under section 18.5. The trial court's action was unauthorized because the Court of Appeal still had jurisdiction over the matter. (*People v. Perez* (1979) 23 Cal.3d 545, 554; *People v. Scarbrough* (Sept. 29, 2015, C075414) __ Cal.App.4th __ [2015 WL 5692824].) Counsel for the People were not aware of these trial court rulings until receiving a copy of the superior court's order from Morales' counsel in September 2015.

[6] Morales' discharge from parole does not render this matter moot, because the issue in this case is likely to recur while evading appellate review and involves a matter of public interest. (*People v. Cheek* (2001) 25 Cal.4th 894, 897-898.) The issue is likely to recur, because, under Proposition 47, defendants have until November 2017, to file petitions for recall of sentence. (§ 1170.18, subd. (j).) Many Proposition 47 resentencings are likely to involve allegations of excess custody credits, because by the time Proposition 47 resentencings occur, many offenders will have served longer than their 364-day maximum misdemeanor sentences. And this issue is of great public interest given the high number of Proposition 47 cases throughout the state and the conflict between this case and the *Hickman* case.

ARGUMENTS

I. CREDITS UNDER SECTION 2900.5 DO NOT APPLY TO PROPOSITION 47 PAROLE UNDER THE PLAIN LANGUAGE OF SECTION 1170.18, SUBDIVISION (D).

The interpretation of a ballot initiative is governed by rules similar to those that apply in construing a statute enacted by the Legislature. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) The language is construed, "giving the words their ordinary meaning." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Statutory language is construed "in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]." (*Ibid.* [alteration in original]) Where the language is ambiguous, the court looks to "'other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'" (*Ibid.*) Ultimately, the court's duty is to "interpret and apply the initiative's language so as to effectuate the electorate's intent." (*Ibid.*) Issues of statutory interpretation are reviewed de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

A. The Statute's Mandatory Terms Must Be Followed

Section 1170.18, subdivision (d), states:

> A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

The first sentence specifies that two things must occur when a defendant is resentenced to a misdemeanor: the defendant "shall be given credit for time served;" and the defendant "shall be subject to parole for one

year following completion of his or her sentence" unless the court in its discretion elects to release the defendant from parole entirely. The fact that the word "shall" appears twice—preceding each of these requirements—makes clear that each requirement is mandatory. (See *Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [under "well-settled principle of statutory construction," the word "shall" is "ordinarily construed as mandatory"].) The third sentence of subdivision (d) specifies, additionally, that the resentenced defendant "is subject to section 3000.08 parole supervision." Once again, the verb ("is") makes clear that parole supervision does not depend on any contingencies. The statute thus imposes three mandatory requirements, which can all be satisfied only if the trial court, when resentencing a defendant, credits previously served custody time against further custody time, but not against parole time.[7]

Judge Couzens and Justice Bigelow, in their comprehensive analysis of Proposition 47, agree with this natural interpretation of the statutory language:

> It appears the intent of the initiative is to authorize the one-year period of parole supervision *in addition to* any resentence imposed by the court, and without consideration of any credit that the petitioner may have earned.... Because the parole term is in addition to the basic misdemeanor sentence, the petitioner will not be allowed to apply excess custody credits to satisfy the supervision period.

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[7] Section 1170.18, subdivision (e) further provides that "resentencing under this section" may not "result in the imposition of a term longer than the original sentence." (§ 1170.18, subd. (e).) That has been interpreted as forbidding the resentencing court from imposing "a parole period longer than the remainder of [the] defendant's PRCS period." (*People v. Pinon* (2015) 238 Cal.App.4th 1232, 189 Cal.Rptr. 920, 924.) But that rule was not the basis of the Court of Appeal's decision, and is not implicated in this case: Morales' resentencing under Proposition 47 occurred when he had served only a few months of his three-year PRCS term. (See slip opn., p. 2.)

(Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act" (February 2015), pp. 56-57 [italics in original].)

This analysis is sound, and the Court of Appeal's view, which fails to give effect to the statute's mandatory terms, must be rejected.

B. The Court of Appeal's Contrary Arguments Are Unconvincing

In rejecting the plain-language reading explained above, the Court of Appeal relied on a variety of other interpretive approaches. Those approaches, however, cannot defeat the statute's mandatory language. At most, they introduce a slight ambiguity, which (as further explained in Part II, below) the voter guide definitively resolves in favor of a one-year parole period not subject to custody credits.

The Court of Appeal believed that custody credits must be applied because subdivision (d) uses the term "subject to" parole. (Slip. opn., p. 8.) But the use of this term cuts the other way. At most, the phrase "subject to" was intended simply to reinforce the resentencing court's statutory discretion to choose not to place certain people on parole—a power that says nothing about whether a court that would choose to impose parole on a particular defender should be prevented from doing so based on excess custody credits stemming from the reduction in the custodial sentence. More likely, the term "subject to parole" echoes the term's use in section 3000.08, subdivision (a), which specifies who is "subject to parole supervision"—a usage that implies that the person is actually serving parole. Such an interpretation would be consistent with the information given to voters, which, as described in Part II below, assured them that resentenced offenders would actually serve parole.

The Court of Appeal correctly noted that Proposition 47 does not specify that parole will apply "notwithstanding any other law." (Slip opn., p. 9.) From this observation, however, the Court of Appeal incorrectly

concluded that Proposition 47 therefore required different treatment from a parole statute that does include such a "notwithstanding" phrase—the Proposition 36 provision at issue in *People v. Espinoza* (2014) 226 Cal.App.4th 635. (See slip. opn., p. 9.) But there was no need to include such a proviso in the Proposition 47 context, because the statute already uses the word "shall." Having already provided specific, mandatory language concerning parole, the drafters had no reason to specify in other terms that that language must be given effect over a general provision appearing elsewhere in the Penal Code. (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976-977, fn. 8 [specific provisions relating to a particular subject govern over general provisions].)

Nor do section 2900.5 excess custody credits relate to the problem that Proposition 47 addresses. Section 2900.5 credits are designed to remedy a particular injustice: "the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts." (*In re Rojas*, *supra*, 23 Cal.3d at p. 156.) This need to prevent unequal treatment for indigents is not implicated where a defendant claims credit based not on an inability to make bail during presentencing custody, but rather on the fact that his legitimate prison sentence was afterwards reduced via an act of mercy and grace. Because section 2900.5 credits are obviously inapposite to the particular goals served by Proposition 47, there was no need for the drafters to specify that voter-enacted mandatory parole would take precedence.

Finally, the Court of Appeal found that application of section 2900.5 was supported by the statement, in section 1170.18, subdivision (m), that "[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant." (Slip. Opn., p. 8.) But the "otherwise available" remedies proviso, by its terms, is designed to preserve remedies that spring from a source "other[]" than

section 1170.18. (See *People v. Diaz* (2015) 238 Cal.App.4th 1323, 190 Cal.Rptr.3d 479, 486.) It is not designed to expand remedies found in section 1170.18 itself, such as section 1170.18's resentencing of felony defendants. Section 1170.18's own terms must therefore control, including the requirement of one year of parole.

This interpretation of subdivision (m) is consistent with precedents addressing similar language, in section 1170.126, subdivision (k), from the Three Strikes Reform Act (Proposition 36). (See § 1170.126, subd. (k) ["Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."].) In *People v. Brown* (2014) 230 Cal.App.4th 1502, the court rejected the argument that the language of section 1170.126, subdivision (k), meant "the Legislature intended to give a trial court the authority to exercise its discretion under section 1385 in determining whether a defendant is eligible to be resentenced under the Reform Act." (*Id.* at pp. 1512-1513.) Instead, the court applied "the plain and commonsense meaning" of another provision section 1170.126—subdivision (e)—which "precludes a trial court from exercising its discretion in the furtherance of justice under section 1385 when determining whether an inmate has satisfied the three criteria set out in that subdivision." (*Id.* at p. 1513.) Similarly, *People v. Yearwood* (2013) 213 Cal.App.4th 161, held that, "Section 1170.126(k) protects prisoners from being forced to choose between filing a petition for a recall of sentence and pursuing other legal remedies to which they might be entitled (e.g., petition for habeas corpus). Section 1170.126(k) does not have any impact in determining if amended sections 667 and 1170.12 operate retroactively." (*Id.* at p. 178.)

These cases reflect a commonsense distinction. The reservation of remedies provision was designed to protect defendants from the possibility that the new statute could be deemed to implicitly displace provisions of

law addressing matters that the new statute does not expressly discuss, such as habeas corpus. Such a reservation does not, however, mean the new statute should not control as to matters that the statute does directly address. Mandatory parole is addressed in the statute, and other provisions of law cannot defeat the voter-enacted decision.

II. ANY AMBIGUITY IS SETTLED BY BALLOT MATERIALS INDICATING A CLEAR EXPECTATION THAT SENTENCE REDUCTIONS UNDER PROPOSITION 47 WOULD INCLUDE THE SAFEGUARDS OF PAROLE

A. The Voter Information Guide Said Resentenced Offenders Would "Be On State Parole For One Year"

Any ambiguity is resolved by the voter information guide, which informed voters that "[o]ffenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), Resentencing of Previously Convicted Offenders, p. 36.)[8]

Voters were told that resentenced offenders would "be on state parole for one year"—not that credits would be used to offset, or eliminate, that mandated period. "[T]he voters should get what they enacted, not more and not less." (*People v. Park* (2013) 56 Cal.4th 782, 796, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

That conclusion is not changed by the Court of Appeal's observation that, in the pre-Proposition-47 context, *Sosa* credits applied to parole. (Slip. opn., p. 8.) It is true that the drafters of an initiative and the voters

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[8] The expectation of mandatory parole also factored into the measure's fiscal analysis: "[T]he resentencing of individuals currently serving sentences for felonies that are changed to misdemeanors would temporarily increase the state parole population by a couple thousand parolees over a three-year period." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), State Effects of Reduced Penalties, State Prison and Parole, p. 36.)

who enact it are presumed to be aware of existing law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283.) But before Proposition 47's creation of misdemeanor parole, the "parole" mentioned in section 2900.5, subdivision (c) meant felony parole. As a result, the most that voters could only be presumed to know is that section 2900.5 credits were available to offset felony parole terms, not the new category of misdemeanor parole created by Proposition 47.

In any case, the specific message conveyed to voters in the voter guide is a far more reliable sign of voters' expectations than speculation about voters' knowledge of prior law. Whatever the state of prior law, voters relying on official election materials had reason to believe that every resentenced defendant would "be on state parole for one year" unless the judge found parole inappropriate. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), Resentencing of Previously Convicted Offenders, p. 36.) In contrast, the Court of Appeal's ruling would mean that some defendants (including Morales) would not "be on" parole at all, notwithstanding the judge's determination that parole is appropriate. Such a reading defeats the will of the voters.

B. Parole Is Required to Effectuate the Overall Purposes of the Scheme the Voters Enacted

There is good reason why the voters, in enacting Proposition 47, insisted that individuals like Morales actually serve one year of parole after a reduction of sentence. Parole supervision serves a purpose: it "help[s] individuals reintegrate into society as constructive individuals." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477.) The Legislature has determined that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship." (§ 3000, subd. (a)(1).) Proposition 47 recognizes that *some* resentenced defendants do not require supervision in order to reintegrate successfully.

The statute therefore provides a means to prevent unnecessary parole: section 1170.18, subdivision (d), allows the court "in its discretion" to release an offender from parole. This discretion may also allow courts to release a resentenced offender from parole if parole would be unwarranted or unjust in light of the length of time that the offender was in custody. There was no reason for drafters and voters to believe that, in cases where parole is deemed necessary and just, excess custody credits should nonetheless prevent an offender from actually serving parole. To the contrary, where the judge determines that parole is necessary for community safety and the offender's reintegration, voters would affirmatively want such supervision to occur. Indeed, for a great many voters, that trade-off was likely crucial to their willingness to allow such offenders to be released from custody early.

Application of excess-custody credits would defeat the voters' intent in another way. When deciding a Proposition 47 resentencing petition, a court is authorized to deny resentencing if the court, "in its discretion," determines that such resentencing "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) In making such a decision, the court may consider "[a]ny ... evidence the court ... determines to be relevant" to the question. (§ 1170.18, subd. (b)(3).) For certain defendants, the availability or unavailability of post-release supervision may well be determinative. Given the important role that such parole plays in reintegrating an offender and protecting the public, there likely is a significant class of defendants who may not pose an "unreasonable risk" if given a year of parole, but who do pose such a risk without parole. Application of excess custody credits therefore is likely to reduce the overall number of felony defendants who receive Proposition 47 resentencing, thus defeating the voters' deincarceration goals and frustrating the voters' intent.

III. IF EXCESS CUSTODY CREDITS UNDER SECTION 2900.5 APPLY TO SECTION 1170.18 PAROLE, THOSE CREDITS SHOULD NOT INCLUDE TIME SPENT IN PRISON OR IN JAIL AWAITING RESENTENCING UNDER PROPOSITION 47

For the reasons above, excess custody credits under section 2900.5 cannot be used to reduce or eliminate one-year Proposition 47 parole under Penal Code section 1170.18, subdivision (d). However, if this court concludes the opposite, the People request that the Court remand the case to the Court of Appeal, with instructions for that Court to consider, in the first instance, the trial court's mid-appeal revised sentence. (See p. 7, fn. 5, *supra* [describing trial court's resentencing without jurisdiction, while case was on appeal].) In that event, the Court should clarify that presentence credits under section 2900.5 do not include the time the defendant spent in prison on the original sentence or the time spent in jail while awaiting resentencing under Proposition 47. Calculation of credits is a complex task, and this Court has recognized the importance of explaining the rules in a way that "can be readily understood and applied." (*People v. Buckhalter*, *supra*, 26 Cal.4th at pp. 28-29.) The People summarize these rules for the Court's convenience.

In addition to excess custody credits under section 2900.5, California law sometimes applies presentence "conduct credits" for performing assigned labor (§ 4019, subd. (b)), and for complying with applicable rules and regulations (§ 4019, subd. (c)), before the defendant begins serving a sentence. (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 30; *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1011.) Once a person begins serving his or her prison sentence, he is governed by "an entirely distinct and exclusive scheme for earning credits." (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 31.) For every six months of continuous incarceration of a determinate sentence served in state prison, most prisoners receive six months of "worktime credit" toward their terms in prison. (*Ibid.*; see § 2933, subd.

(b); *In re Jenkins* (2010) 50 Cal.4th 1167, 1177-1179.)[9] After a defendant begins serving a sentence in prison, and that sentence is recalled, the credits he or she receives at resentencing for the same criminal act or acts, for his or her time in prison and in jail awaiting resentencing, is governed by section 2900.1, not section 2900.5. (*People v. Johnson* (2004) 32 Cal.4th 260, 266-268.)[10] "[S]ection 2900.1[] omits reference to presentence custody credits under section 4019 because it refers to a prison sentence already in progress, and recall of such a sentence does not restore a convicted felon to presentence status." (*Id.* at p. 268.) Under section 2900.1, the trial court credits the defendant for the actual days he or she spent in prison on the original sentence or in jail awaiting resentencing. (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 37; *People v. Saibu*, *supra*, 191 Cal.App.4th at p. 1012.)

Because the trial court's latest resentencing order was issued without jurisdiction while appellate proceedings were still pending, the order would have to be reconsidered even if this Court were to hold that excess custody credits applied. As a result, the People suggest that the Court should take the opportunity to clarify that, based on existing precedent, presentence

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[9] Lesser credits apply to felony defendants with prior strike convictions and defendants convicted of violent felonies. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5), 2933.1, subd. (a); *In re Young* (2004) 32 Cal.4th 900, 905-906; *In re Martinez* (2003) 30 Cal.4th 29, 34; *In re Tate* (2006) 135 Cal.App.4th 756, 758.)

[10] Section 2900.1 states:

> Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.

credits under section 2900.5 do not include the time the defendant spent in prison on the original sentence or the time spent in jail while awaiting resentencing under Proposition 47. The Court of Appeal can then consider the appropriateness of the trial court's latest resentencing order in the first instance.

CONCLUSION

The Court of Appeal's judgment should be reversed.

Dated: October 15, 2015

Respectfully submitted,

KAMALA D. HARRIS
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71133942.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4617 words.

Dated: October 15, 2015

KAMALA D. HARRIS
Attorney General of California

MARVIN E. MIZELL
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MEM:sam
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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: ***People v. Morales***
No.: **S228030**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **October 15, 2015**, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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9921 Carmel Mountain Rd. #355
San Diego, CA 92129
Attorney for Appellant
(2 Copies)

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Clerk of the Court
Central Justice Center
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Fourth Appellate District
Division Three
Court of Appeal of the State of California
P.O. Box 22055
Santa Ana, CA 92702

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **October 15, 2015**, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to **Appellant's attorney's (Christian C. Buckley) electronic service address ccbuckley75@gmail.com** by 5:00 p.m. on the close of business day.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 15, 2015**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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