IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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	)	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 REPLY BRIEF ON THE MERITS

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

In the Opening Brief on the Merits (BOM), appellant argued that a recall court determining eligibility under Penal Code section 1170.126, enacted by Proposition 36, must use a beyond a reasonable doubt standard when deciding whether the commission of an otherwise eligible offense involved conduct that would render it ineligible. Appellant based this conclusion on a combination of constitutional due process considerations and simple interpretation of the statute in the context of its statutory scheme. Appellant

asserted that the general due process concerns that dictate what level of proof will be required compel the conclusion that something more than a preponderance of the evidence must be applied to the eligibility inquiry. (BOM 12-16) Basic rules of statutory interpretation and the entire revised Three Strikes sentencing scheme, however, are what dictate that the standard rise all the way to beyond a reasonable doubt. (BOM 16-18)

Respondent, in part by recasting appellant's argument as being that due process requires that beyond a reasonable doubt apply, and in part by misinterpreting section 1170.126, urges that appellant is wrong. Respondent generally asserts that the entire recall process is but an exercise of judicial sentencing discretion that should be governed by no standard other than a preponderance of the evidence. Respondent is wrong because the recall court does not enjoy discretion on the issue of eligibility for recall. Rather, the court only has discretion as to the second issue of whether the sentence should be recalled and reduced.

B. Read as a Whole, the Reform Act's Text and Structure Demonstrate an Intent that a Beyond a Reasonable Doubt Standard Apply to Eligibility Determinations

Respondent asserts that the failure of the statute to declare beyond a reasonable doubt as the standard of proof demonstrates the intent that the default standard of preponderance applies. (ABM 11, 13-19)[1] Respondent argues that in enacting Penal

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[1]/ As appellant asserted below, the statute really does not reflect an intent that any new factual findings should be made as to eligibility, and thus, no burden of proof would attach to the question of eligibility. Eligibility is meant to be a question of law that

Code section 1170.126, the electorate is deemed aware of existing law which includes Evidence Code section 115, which provides that "except when otherwise provided by law" the burden is a preponderance. And so, by not stating a standard of proof in section 1170.126, the electorate must have adopted the preponderance standard. (ABM 14) Evidence Code section 115, however, does not answer the real inquiry, which is whether the law otherwise provides or requires a different burden of proof. It rather begs the question.

In arguing that a higher standard is not required, respondent recognizes that the Act does not specify a standard of proof for either the retroactive or prospective determination of disqualifying conduct, but that the beyond a reasonable doubt standard may be inferred for the prospective application of the Act because a pleading and proof requirement attaches to it.[2] (ABM 14) From there, respondent notes that there is no pleading and proof requirement for the retrospective application of the Act and reaches the faulty conclusion that this means that only a preponderance is required retrospectively. (ABM 14-16)

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should be determined by application of the long-settled rule for determining conduct-based factors relevant to the applicability of the Three Strikes law that was first outlined in *People v. Guerrero* (1988) 44 Cal.3d 343. Thus, the lack of reference to a standard of proof actually reflects an intent that no determination of facts be made, and therefore, no standard of proof need be applied. This Court has limited the question here to which standard applies, and thus, appellant is assuming a burden was intended.

[2]/ Respondent recognizes that such requirement for prospective application is compelled by both state law and the federal constitution. (ABM 14)

Appellant agrees that there is no pleading and proof requirement in the context of recall eligibility, but that fact does not demonstrate that the electorate intended that facts related to eligibility be shown by only a preponderance of evidence. Respondent creates a false dichotomy. The absence of a pleading and proof requirement does not establish that a preponderance standard was intended; imposing a pleading and proof requirement is not the only way to demonstrate an intent to require a beyond a beyond a reasonable doubt determination. The electorate's intent is far more nuanced and must be determined by consideration of multiple factors and in the context of the purpose of the entire scheme. (See *People v. Conley* (2016) 63 Cal.4th 646, 658 [§ 1170.126 designed to strike a balance between competing objectives].)

The "overarching purpose" of the Act was "to retreat from the required imposition of unduly long sentences" and section 1170.126 is "intended solely to provide inmates with an opportunity to have their sentences reduced." (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1425.) Thus, it should not be construed broadly against a finding of eligibility. (See *Ibid.*)

The lack of a pleading and proof requirement most clearly demonstrates that the electorate did not intend a new trial as to whether the defendant engaged in disqualifying conduct. (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058-1059.) But the failure to require such a full blown hearing does not demonstrate an intent that the factors need only be shown by a

preponderance of the evidence for purposes of recall eligibility. As the court noted in *Bradford*, the pleading and proof language in the prospective statute is replaced by a prerequisite that the "current sentence was not imposed for" an offense involving excluded conduct. (*People v. Bradford, supra*, 227 Cal.App.4th at p. 1333.) Sentences are only imposed after convictions, which in turn require proof beyond a reasonable doubt. Thus, the statute includes limitations on the findings of eligibility that relate to matters found beyond a reasonable doubt.

In fact, with the exception of the factors in Penal Code sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii),[3] all of the facts rendering a defendant ineligible will have been found beyond a reasonable doubt as elements of named offenses. While the subdivision (iii) factors, of necessity, have to be found by different means because there was no prior trial of these specific facts (see *People v. Conley, supra*, 63 Cal.4th at pp. 659-660 [prior to the Act these factors would not have been pleaded and proved]), it does not follow that the electorate intended that they be singled out for determination by a far less stringent standard. And there is no reason that they should be.

Rather, application of a beyond a reasonable doubt standard to these eligibility factors best promotes all of the purposes of the statute. As this Court noted in *Johnson*,

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

"except for the resentencing statute's provision granting the trial court authority to deny resentencing if reducing the sentence would pose a danger to the public, the resentencing statute's exceptions to the new sentencing rules are the same factors that exclude a defendant from being sentenced pursuant to Proposition 36's more lenient provisions. [Citations] *This parallel scheme suggests that the sentencing rules are intended to be identical except in that one respect.*" (*People v. Johnson* (2015) 61 Cal.4th 674, 691 [emphasis added; see also *id.* at p. 686, "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 "set forth identical exceptions to the new sentencing rules"]; see also *People v. Arevalo* (2016) 244 Cal.App.4th 836, 853.)

Application of a beyond a reasonable doubt standard to eligibility ensures that this intent to have the rules operate identically prospectively and retrospectively *except as to denial of resentencing to those found unreasonably dangerous* is fulfilled. (See *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 readily results in disparate treatment of defendants retrospectively.

In *Arevalo*, the use of a preponderance standard resulted in the recall court deeming Arevalo not eligible for resentencing based upon its finding that Arevalo 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. Thus, Arevalo was excluded from eligibility for resentencing to a determinate sentence based on findings made under the preponderance standard, when based on his jury's verdict under the higher standard his receipt of the determinate term would have been required. This violated "*Johnson*'s 'equal outcomes' directive." (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.)

Respondent asserts that this Court's observations as to the electorate's intent in *Johnson* has no application in the context of eligibility based upon the factors in subdivision (iii). Respondent urges that this Court's *equal outcomes* concern was limited to the question of "whether a defendant should be eligible for resentencing if his third strike was not listed as a serious felony at the time of his conviction. (ABM 19-20) While this Court did use the equal outcomes directive to address the issue of which list of serious felonies controlled the question of eligibility (current or past) (*People v. Johnson*, *supra*, 61 Cal.4th at p. 686), it did not limit its application of the directive to that context. In fact, this Court applied the same legislative intent to its conclusion that the determination of eligibility had to be made on a count by count basis. (*Id.* at p. 691.)

Nor does it appear that the electorate was attempting parallel application as to some eligibility factors and not others. All of the eligibility factors are identical, and the only apparent exception to identical treatment for prospective and retrospective

application of the Act is to give the recall court discretion not to resentence eligible defendants who pose an unreasonable risk to the public. (See *Id.* at pp. 686, 691.)

Respondent relies on this Court's observation that the Act is more "cautious" with respect to resentencing. (ABM 16-17) Respondent asserts that use of a preponderance standard is consistent with this "cautious" intent. (ABM 17) True, but the cautiousness was not manifested in the context of eligibility, which the Act makes dependent on identical factors prospectively and retrospectively. Rather, it is furthered by the additional discretion given the recall court to not resentence an eligible defendant. (*Id.* at p. 686.)

Respondent suggests that this "cautious" intent appears throughout the recall statute and is promoted by the inclusion in Penal Code section 1170.126 of disqualifying criteria that are broader than the elements of the original offense. (ABM 17) This argument is misplaced. First, the additional disqualifying criteria are merely the exact criteria applicable to disqualify defendants prospectively. Thus, their inclusion in section 1170.126 is needed to ensure that the identical criteria apply prospectively and retrospectively. Nothing suggests that they were added to section 1170.126 to do anything else, and nothing suggests that their addition without a pleading and proof requirement was intended to make it easier to deny relief retrospectively.

Rather, the lack of a pleading and proof requirement in the recall context appears to be based upon the intent of the electorate not to have a contested hearing on eligibility.

Eligibility is meant to be a question law, not fact. (See *People v. Berry*, *supra*, 235 Cal.App.4th at pp. 1420-1421; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7.) It is not, as is the later suitability proceeding, subject to judicial discretion. "The eligibility determination at issue is not a discretionary determination by the trial court, in contrast to the ultimate determination of whether an otherwise eligible petitioner should be resentenced. Section 1170.126, subdivision (f), describing the eligibility determination, simply provides that 'the court shall determine whether the petitioner satisfies the criteria in subdivision (e) ... .' Only after making that determination does the statute describe any exercise of discretion on the part of the trial court." (*People v. Bradford*, *supra*, 227 Cal.App.4th at p. 1336.)

Thus, it is not the lack of pleading and proof or the use of a lesser standard of proof that is meant to cautiously protect the public. Rather, it is the "failsafe" provision of discretion to decline to resentence an eligible defendant if he poses too great a risk to public safety that does so.

Respondent urges that the use of a beyond the reasonable doubt standard could allow "truly dangerous prisoners" to take advantage of the shortcomings of the historical records of past convictions and obtain a reduced sentence for which they were, in reality, disqualified. The use of a preponderance standard, respondent asserts, will allow the prosecution to establish the disqualifying circumstances where warranted, while imposing a beyond a reasonable doubt standard would "in many cases" render the prosecutor

unable to prove them. (ABM 17-18) This reasoning is flawed.

Under any standard, there remains the possibility that the prosecutor will not be able to establish the disqualifying factors on an inadequate past record. And, although the use of the lesser standard will allow the prosecution to establish more disqualifying factors, so will it "in many cases" allow the prosecutor to establish them where they were not "warranted" but were not disputed by a defendant who had no incentive to dispute them. The inadequacies of the record work both ways.

The failsafe provision of discretion to deny resentencing to defendants found eligible for it is the means by which the electorate cautiously protected the public. No truly dangerous defendant can fall through the cracks or take advantage of the "windfall" of an inadequate prior record. It is in exercising the discretion to deny resentencing to an eligible defendant who poses an unreasonable risk to the safety of the public that the recall court may use the lesser preponderance standard and make findings inconsistent with a prior verdict. (See *People* v. *Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; cf. *In re Coley* (2012) 55 Cal.4th 524, 557.) The recall court may also consider additional information and engage in new litigation at the hearing anticipated for this later stage in the proceedings. (Pen. Code, sec 1170.126, subd. (g).)

The protection of the public from mistakes in eligibility determinations or the inadequacy of the procedure appears to be the primary purpose of the added discretion give the recall court in the retrospective application of the Act. Going forward, even

dangerous felons whose crimes are not found to include the disqualifying factors will be required to be sentenced to a determinate term. (Pen. Code, §§ 667, subd.(f)(1); 1170.12, subd. (d)(1).) But going forward, the parties will be able to fully litigate the disqualifying factors with the incentive to do so.

To make the outcomes close to parallel prospectively and retrospectively, the Act should be read to require that *eligibility* determinations be made based upon a beyond the reasonable doubt standard, the same standard that applies prospectively. Thereafter, to adjust for situations in which a dangerous defendant is deemed *eligible* for a sentence recall, for whatever reasons including shortcomings in the record of the prior, the recall court has discretion to decline resentencing to safeguard the public. This interpretation avoids the problems that arose in *Arevalo* and ensures that all qualified, non-dangerous felons are released early to leave room in prison for the truly dangerous felons (see *People v Conley, supra*, 63 Cal.4th at p. 658; *People* v. *Johnson, supra*, 61 Cal.4th at p. 690), while also keeping those dangerous felons who should not be released in prison. This interpretation implements the full intent of the electorate in passing Proposition 36. (*Ibid.*)

C. A Standard of Proof Higher than Preponderance Is Constitutionally Required

Respondent argues that appellant and *Arevalo* are wrong to conclude that due process requires a standard higher than a mere preponderance. (ABM 20-24) Respondent does so by misreading *Arevalo* and focusing on the wrong step in the recall

process.

Contrary to respondent's assertion, the *Arevalo* court did not believe that "due process requires a beyond a reasonable doubt standard." In fact, *Arevalo* and the concurrence in *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1349-1350 upon which it relied, merely found that due process required a standard higher than a mere preponderance. (See *People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 850-852; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1349-1350, conc. opn. of Raye, P.J.) The *Bradford* concurrence suggested clear and convincing, but the *Arevalo* court chose beyond a reasonable doubt, *not because it was constitutionally compelled*, but because of the equal outcomes directive recognized by this Court in *Johnson*. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 852-853.)

Both *Arevalo* and *Bradford* based their conclusions in part on the liberty interests of the defendant that are at stake in a recall setting. Both recognized that these interests are limited because the previously lawfully imposed sentence that is potentially being ameliorated diminishes the defendant's liberty interest. (*People v. Arevalo*, *supra*, 244 Cal.App.4th at pp. 851; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1349.) This interest, though diminished, is still substantial because of dramatic difference in future time the defendant faces depending on the outcome of the proceeding. (*Ibid.*)

Respondent discounts this assessment primarily by focusing on the wrong point of the recall analysis. Respondent analogizes the defendant at the eligibility stage of the

recall process with a parolee facing a parole board, who has only a minimal right to a fair procedure based upon a "state created" right to amelioration of his sentence. (ABM 21-22)

Respondent, however, is looking at the wrong step in the process. A defendant at the hearing on whether the court should exercise its discretion to deny resentencing is in a similar situation to the lifer at his parole hearing; there, the focus is on whether release is appropriate or whether he poses too great a risk to the public. At the point of the *eligibility* determination, however, the recall petitioner has a much greater liberty interest at stake - whether he will potentially have a fixed determinate term, uncontrolled by the parole board, or a life time of parole hearings ahead of him.

Respondent assumes that the only liberty interest created by the state with the Act was the right to seek a lesser sentence and treats all points in the process the same. The Act, however, creates more than the right to seek a recall, it provides a definition of who is eligible for the recall. And, the liberty interest in eligibility determinations is considerably higher than those of a lifer at a parole hearing who has already by reason of his status been deemed *eligible* for the hearing. It is those interests at the eligibility phase that give rise to the need for a heightened standard of proof.

Respondent urges that the risk of error in an eligibility finding is equal between the defense and the prosecution because each had limited incentive to litigate the disqualifying factors at the earlier trial. (ABM 23) Respondent is considering the wrong

risk of error. It is not the risk of a court misapprehending the actual conduct, but the risk of the consequence of that finding, eligibility or ineligibility, that is at stake. If the court incorrectly rules for the defendant, the game is not over for the prosecution because there is still the hearing on the defendant's suitability for recall. In contrast, for the defendant, the game is over; if he is deemed ineligible, he cannot get a recall no matter how suitable he is. It is that imbalance of risk that due process requires be considered and accommodated.

Thus, due process does require a higher standard of proof than an mere preponderance. Irrespective of this constitutional imperative, however, the statute should be interpreted as requiring use of the beyond a reasonable doubt standard in order to effectuate the electorate's intent in enacting it.

D. Conclusion

Therefore, both as a matter of due process and to effectuate the intent of the voter's in enacting Proposition 36, this Court should hold that at the eligibility hearing, the recall court must use the beyond a reasonable doubt standard in finding facts rendering the defendant ineligible for recall.

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Dated: March 28, 2017

Respectfully submitted,

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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 3,498 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 March 28, 2017, I served the within

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

Executed March 28, 2017 at Los Angeles, California.

JACQUELINE GOMEZ