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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The People's opening brief demonstrated that Proposition 47's text and its accompanying ballot materials, taken separately or together, convey a clear intent for a particular safeguard to operate in the case of those released early from confinement: the offender, though released from incarceration early, would be under parole supervision for a year unless the Superior Court judge who resentenced him found such supervision unnecessary for community safety. In contesting this view, Morales leans heavily on a debatable assumption that the voters knew about and expected the application, in the new Proposition 47 resentencing context, of various background regimes, including that concerning excess custody credits. Indeed, for Morales' view to prevail, those assumptions would have to be given more force than the statute's textual provision that resentenced offenders "shall" be subject to a year of parole. Although Morales portrays his contention as one based on the Proposition's text, his argument in fact consists of a highly speculative foray in the non-textual subject of voter expectations. Such speculation is unnecessary, because the subject of voter expectations is definitively answered by the official ballot materials, which leave no doubt that voters were assured the safeguard of parole for Proposition 47 beneficiaries. The court of appeal's contrary decision should be reversed, and the case should be remanded for reinstatement of the Superior Court's original sentence, which included a year of parole.

ARGUMENT

I. NOTHING IN THE LANGUAGE OF SECTION 1170.18(D) SPECIFIES THAT AN EXCESS CUSTODY CREDIT REGIME SHOULD CONTROL OVER THE EXPRESS STATUTORY PROVISION FOR ONE YEAR OF PAROLE

Penal Code section 1170.18, subdivision (d), provides that a resentenced offender "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 . . . releases the person from parole."[1] As the People's Opening Brief explained (pp. 8-9), these two commands will be fully met if the offender's time-served is credited against any remaining incarceration and he serves a year of parole upon his release. In contrast, the command that an offender be "subject to parole for one year following completion of his or her sentence" will not be met if the application of excess custody credits reduces the offender's time on parole to nothing, as Morales contends should be the case for him.

Morales argues that the statutory term "shall" cannot have mandatory effect, because "the trial court can exercise discretion to withhold" parole under the statute. (ABM 17; see § 1170.18, subd. (d) [offender "shall be subject to parole for one year . . . , unless the court, in its discretion, . . . releases the person from parole"].) But that does not contradict the People's understanding of the word "shall." Discretionary withholding of parole is provided for by the "unless" clause, which modifies the word "shall" with a negative condition: The offender "shall be subject to parole for one year . . . , *unless* the court, in its discretion, . . . releases the person from parole. (§ 1170.18, subd. (d), emphasis added.) The fact that there is

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[1] Unless otherwise indicated, all statutory citations in this Reply Brief are to the Penal Code. Morales' Answering Brief on the Merits is cited as "ABM," and the Clerk's Transcript is cited as "CT."

an exception where the "unless" clause applies (*i.e.*, where the judge exercises her discretion not to impose parole) does nothing to undermine the mandatory force of "shall" where the exception does not apply. Morales also argues (ABM 17) that the term "shall" cannot have the force the People contend because subdivision (e) of the statute will sometimes result in an offender serving less than a year of parole, to prevent the new sentence from amounting to "a term longer than the original sentence." But that, too, is an express exception to the scope of the statutory command. It says nothing to indicate that the command should not apply in other cases. "'Under the maxim of statutory construction, *expressio unis est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.' [Citations]." (*People v. Palacios* (2007) 41 Cal.4th 720, 732).

Morales argues (ABM 19-20), based on *In re Chaudhary* (2009) 172 Cal.App.4th 32, that if the drafters of Proposition 47 had wanted to limit the application of excess custody credits then they would have used other language. *Chaudhary* rejected the application of excess custody credits to a defendant seeking early discharge of his lifetime parole. (*In re Chaudhary, supra,* 172 Cal.App.4th at p. 34.) The statute in question, section 3000.1, subdivision (b), provided for discharge when the offender "'has been on parole continuously for . . . five years . . . since release from confinement.'" (*In re Chaudhary, supra,* 172 Cal.App.4th at p. 37.) *Chaudhary* held that that language explicitly foreclosed any possibility that excess custody credits could operate to permit discharge sooner than five years after release from confinement. But *Chaudhary* does nothing to advance Morales' case. True, the language in *Chaudhary* was exceptionally clear. But the language here is clear, too: Section 1170.18, subdivision (d), requires a resentenced offender to be "subject to parole for one year *following completion of his or her sentence*" (emphasis added). The statutory text thus indicates that

parole begins when incarceration has ended—which, indeed, is the commonsense understanding of what parole means.

The requirement that the year of parole be "following completion of [the offender's] sentence" also disproves Morales' claim (ABM 11) that he was effectively "subject to parole" while still incarcerated. (See also ABM 23 [implying view that a person may "'be' on parole" even while incarcerated].) For parole to be both "following completion" of the sentence, and while the offender serves his sentence, is nonsensical.

The People's interpretation resolves these problems. It gives meaning to the statute's two explicit exceptions, without supplementing them through implied additional exceptions. And as the statute commands, any parole begins "following the completion" of the offender's sentence—*i.e.*, when he is no longer in custody. The court of appeal's interpretation, which contradicts this straightforward reading of the text, should be reversed.

II. MORALES' ARGUMENTS RELY NOT ON THE STATUTE'S PLAIN LANGUAGE BUT ON SPECULATIVE ASSUMPTIONS AND PRESUMPTIONS ABOUT VOTER EXPECTATIONS, WHICH IS AN ISSUE BETTER SETTLED BY THE VOTER GUIDE

Although Morales claims (ABM 18) that the People are "'insert[ing] words into a statute under the guise of interpretation,'" the People, as explained above, rely on the statute's express words. In contrast, Morales seeks to supplement those express provisions with a host of extratextual "presum[ptions]" (ABM 12, 13, 14, 23), with guesses about whether the drafters were aware of various intermediate appellate court precedents (ABM 14), and with Morales' judgment about what it is "doubtful that the drafters would have" done (ABM 21) versus what he thinks the drafters "could have" done differently (ABM 14).

Morales' guesses are debatable on their own terms. Even if a voter knew of the concept that *Sosa* credits may apply to a felony offender's

original sentence, why would that voter have reason to believe that such credits would apply to resentenced offenders—particularly when the initiative's text (reinforced by the ballot materials, as discussed below) seems to guarantee one year of parole? Because Proposition 47 parole and felony parole are significantly different, the effect of such credits is different as well. The length of felony parole varies by the seriousness of the offense, ranging from three years to life. (§ 3000, subd. (b); § 3000.1, subd. (a)(1).) For such offenders, it is rare indeed for *Sosa* credits to completely eliminate parole. For a Proposition 47 offender who is resentenced under section 1170.18, subdivision (d), in contrast, parole only lasts one year, and cases like Morales', where the parole period will be completely vitiated should credits apply, will be frequent. As a result, voters' experience or knowledge of the preexisting felony parole regime would not have led them to expect the result that Morales claims should apply here: the complete vitiation of parole safeguards even where the judge deems parole necessary.

The tenuousness of Morales' assumptions is exemplified by his assertion (ABM 14) that the drafters of Proposition 47 were aware of and chose the initiative's language based on the court of appeal decisions in *People v. Espinoza* (2014) 226 Cal.App.4th 635, 638-639, and *People v. Tubbs* (2014) 230 Cal.App.4th 578, 585. Those cases held that Post Release Community Supervision (PRCS) is not subject to excess custody credits. Morales maintains that the drafters of Proposition 47, knowing of those opinions, consciously chose parole over PRCS precisely so that custody credits would apply. (ABM 14.) But this Court may take judicial notice of the fact that Proposition 47's sponsors submitted the initiative's

text and requested a title and summary on December 17, 2013.[2] The *Espinoza* opinion was not originally filed until May 27, 2014, and *Tubbs* was not originally filed until October 10, 2014. (*People v. Espinoza, supra,* 226 Cal.App.4th at p. 635; *People v. Tubbs, supra,* 230 Cal.App.4th at p. 578.) The text of Proposition 47 thus could not have been drafted in reaction to *Espinoza* and *Tubbs*.[3]

As this example shows, Morales' assumptions about the background knowledge of Proposition 47's drafters and voters are highly questionable. Such assumptions should not in any sense be mistaken for an argument based on plain statutory language. (Indeed, Morales elsewhere backs away from his claimed reliance on clear language: the very fact of a split of authority in court of appeal decisions, he argues, indicates that the language is not clear. (ABM 22.)) In fact, Morales' arguments all ask this Court to go beyond the statutory text in determining the voters' intent. If that is to be done, however, then the best resource for determining what voters actually believed they were enacting is the Voter Information Guide. Reliance on the Voter Information Guide removes the need for speculation about what information voters did or did not have: the Guide's text was

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[2] (See William Lansdowne, letter to Initiative Coordinator, Office of Attorney General, Dec. 17, 2013, available at https://oag.ca.gov/system/files/initiatives/pdfs/13-0060%20%2813-0060%20%28Neighborhood%20and%20School%20Funding%29%29.pdf [submitting proposed initiative, with initiative text attached].)

[3] The fact that *Espinoza* postdates Proposition 47's drafting and submission also disproves Morales' assumption that Proposition 47's drafters intentionally chose not to include a statement that the year of parole would apply "notwithstanding any other law." (ABM 21.) Morales claims that the initiative's drafters would have read the *Espinoza* opinion's interpretation of Proposition 36 as indicating that inclusion of such a "notwithstanding" clause is the way to make clear that custody credits do not apply. (ABM 21.) Since the *Espinoza* opinion did not exist when Proposition 47 was being drafted, Morales' argument is wrong.

literally mailed to voters' homes and in their hands when they were making up their minds.

The parties agree that the Voter Information Guide 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.) This explanation is flatly incompatible with Morales' reading of the Proposition's text, since a resentenced offender whose parole is shortened (or eliminated) by excess credits will not "be on state parole for one year."

Morales argues that Proposition 47's provision for parole would not have been of concern to the voters, because voters "would likely have understood that the main intent of Prop[osition] 47 [was] the reduction of law enforcement spending on low grade offenders." (ABM 24.) But Morales may not pick and choose elements of the Proposition's overall scheme. The Proposition enacted a trade-off, in which offenders would be resentenced *and* subject to parole unless the judge deemed parole unnecessary. Requiring offenders to serve a year of parole does not significantly harm the cost-savings goals of Proposition 47, given how much less expensive parole is than prison. Any cost concerns would have been amply dealt with by voters' expectation that judges would exercise their discretion wisely, withholding parole (and its attendant costs) in the cases of offenders who did not need it. For offenders who the judge thought did require parole, voters would understand as a matter of common sense that parole would serve valuable functions of reintegrating offenders and safeguarding the community. (See People's Opening Brief on the Merits 14). Morales' case underscores why voters would want those functions fulfilled for a resentenced offender: Given Morales' prior conviction for robbery (see CT 19), the judge here—like the voters as a

general matter—deemed it unwise to release him from custody with no further control or supervision at all.

In proposing that the one-year parole mandate should be frequently without effect, Morales essentially asks this Court to conclude that the ballot materials were not only unclear but affirmatively misleading. The fact that parole is specifically provided for in the statute and mentioned in the Voter Information Guide shows that the special functions of parole were intended to be served. That intention should be given effect.

III. THIS COURT SHOULD SET ASIDE THE TRIAL COURT'S REVISED ORDER APPLYING CREDITS WHILE THIS APPEAL WAS PENDING

Morales argues that the trial court's July 25, 2015, order that awarded him excess custody credits under section 2900.5 on his parole under section 1170.18, subdivision (d), cannot be challenged because the People did not appeal the issue. (ABM 30-31.) Morales further asserts that respondent's challenge fails substantively because the asserted credit error made the trial court's original resentencing order unauthorized and void, giving the trial court jurisdiction to correct the error later even though the case was on appeal. (ABM 31-32.)

For the reasons we have explained, the trial court's original order on November 18, 2014, which did not award section 2900.5 excess custody credits toward parole, was correct, and thus, not unauthorized. The filing of Morales' notice of appeal divested the trial court of jurisdiction until such time as this appeal is finally decided and the remittitur issues. (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472.) The action by the trial court on July 25, 2015, was thus null and void for lack of jurisdiction. (*Id.* at p. 1473.) As a result, that order may be set aside at any time, whether or not there was an objection or appeal. (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1781.) In any case, when this Court reverses the Court of

Appeal's decision with respect to the application of credits, the matter will be remanded to the trial court. As in *People v. Perez* (1979) 23 Cal.3d 545, 554, that in itself will require the Superior Court to reconsider its sentencing order. (See *ibid.* ["on remand the trial court will be free to re-determine the matter in light of our holding"].)[4]

CONCLUSION

The Court of Appeal's judgment should be reversed.

Dated: December 16, 2015 Respectfully submitted,

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[4] Morales agrees with the People that, in any event, a person resentenced under Proposition 47 should "not earn 'pre-sentence' credits for time spent in custody following sentencing and awaiting resentencing (*i.e.*, prison custody)." (ABM 27 fn.5.) As the People have observed, there would be value in the Court reiterating that limitation if custody credits are held to apply to Proposition 47 parole. (See People's Opening Brief on the Merits, pp. 16-18.)

CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,553 words.

Dated: December 16, 2015

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

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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.

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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 **December 16, 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 **December 16, 2015**, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature

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