IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ERNEST LANDRY,** Defendant and Appellant.	H040337 (Santa Clara County Superior Court No. 186848)

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA,
THE HONORABLE THOMAS HASTINGS, JUDGE

DALLAS SACHER, ESQ.
Executive Director
State Bar No. 100175
SIXTH DISTRICT APPELLATE PROGRAM
100 N. Winchester Blvd., Ste. 310
Santa Clara, CA 95050
(408) 241-6171-phone
(408) 241-2877-fax
dallas@sdap.org

Attorney for Appellant,
Ernest Landry

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INTRODUCTION

On November 4, 2014, the electorate passed Proposition 47. The statutory amendments set forth in Proposition 47 went into effect on November 5, 2014. (California Constitution, Article II, section 10 ["An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election . . ."].)

In material part, Proposition 47 added Penal Code section 1170.18. The new section provides a procedure by which certain felons who are serving a sentence may petition the trial court for a reduction of their convictions to misdemeanors. In considering a petition, the court is to determine if the defendant presents an "unreasonable risk of danger to public safety." (Section 1170.18, subd. (b).) Significantly, the statute sets forth a definition of "unreasonable risk of danger to public safety" which is to apply in all cases

arising under the Penal Code.

> "*As used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (Section 1170.18, subd. (c), emphasis added.)

In the case at bar, the trial court declined to resentence appellant based on its finding that he presented an "unreasonable risk of danger to public safety." However, at the time of the trial court proceedings, there was no specific definition as to what might constitute an "unreasonable risk of danger to public safety." The electorate has now provided that definition by requiring relief unless the defendant poses a threat that he will commit a "violent felony" as that term is defined in Penal Code section 667, subdivision (e)(2)(C)(iv). Insofar as the new definition is far more restrictive than the definition employed at appellant's hearing, the case must be remanded for further proceedings.

I.

THE CASE MUST BE REMANDED TO THE TRIAL COURT FOR RECONSIDERATION PURSUANT TO THE NEWLY ENACTED DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY."

At the time of appellant's Penal Code section 1170.126 hearing, the trial court was required to reduce his sentence unless a finding was made that he posed "an unreasonable risk of danger to public safety." (Section

1170.126, subd. (f).) The determination was to be made on the basis of several factors. (Section 1170.126, subd. (g)[1]/ However, the phrase "unreasonable risk of danger to public safety" was left without concrete definition so that the court might have flexible discretion. (*People v. Flores* (2014) 227 Cal.App.4th 1070, 1075 [holding that there was "'no formula'" for the application of the standard].)

In its wisdom, the electorate has now enacted a far more specific definition of "unreasonable risk of danger to public safety." Under the new definition, a court is now mandated to grant relief unless there is "unreasonable risk" that the defendant will commit a "violent felony" as that term is defined in Penal Code section 667, subdivision (e)(2)(C)(iv). Insofar as section 667, subdivision (e)(2)(C)(iv) provides for a discrete list of only the most dangerous of felonies, it goes without saying that the electorate has now

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[1]Penal Code section 1170.126, subdivision (g) provides:

"In exercising its discretion in subdivision (f), the court may consider:

"(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes;

"(2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and

"(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety."

required that even greater relief must be granted under section 1170.126. For the reasons that follow, this court should remand the case to the trial court for a new hearing.

At the outset, there can be little doubt that the new definition specified in section 1170.18 applies to section 1170.126 proceedings. The new definition is specifically made applicable to the phrase "unreasonable risk of danger to public safety" as that phrase is "used throughout *this Code* . . . ." (Section 1170.18, subd. (c), emphasis added.) Plainly, the word "Code" refers to the entirety of the Penal Code. No other interpretation is plausible. (*People v. Hull* (1991) 1 Cal.4th 266, 271 [statutory language is to be accorded its "usual and ordinary meaning. [Citations.]."].)

Although resort to other statutory construction techniques is unnecessary, it is worth noting that the overarching purpose of Proposition 47 is consistent with the application of the new definition to section 1170.126 proceedings. In the Findings and Declarations section of Proposition 47, the electorate asserted that the law was enacted "to ensure that prison spending is focused on violent and serious offenses . . ." Obviously, the use of the new definition in section 1170.126 proceedings will lead to a decrease in prison spending for those who were not convicted of violent and serious offenses. (*Hull*, *supra*, 1 Cal.4th at p. 271 [statute is to be construed in a manner consistent with its purpose].)

The next question is whether section 1170.18 applies to section 1170.126 cases that are pending on appeal. The answer is yes.

The general rule is that a new statute which lessens punishment will be applied to a non-final judgment. (*In re Estrada* (1965) 63 Cal.2d 740, 748.) The exception to the rule is that a statute will not be given retroactive effect when it contains a savings clause. (*Ibid*.) In this instance, there is no savings clause in section 1170.18 with respect to the operation of the new definition of "unreasonable risk of danger to public safety."

Section 1170.18 provides two sets of remedies to defendants who have sustained specified felony convictions for drug possession and theft offenses. First, relief can be granted to those still serving a sentence. (Section 1170.18, subd. (a).) Second, a remedy lies for those who have "completed" their sentences. (Section 1170.18, subd. (f).) Given this generous array of possible relief, it is unquestionable that the new definition of "unreasonable risk of danger to public safety" is to be given broad application to those judgments which are not yet final. This is necessarily so since the new remedy applies to final judgments.

Finally, there is no question that a remand is required for a new hearing. At the time of appellant's hearing, the trial court was afforded wide discretion in applying the flexible, non-formulaic definition which was then in existence. (*People v. Flores, supra*, 227 Cal.App.4th 1070, 1075.) The new standard is

far more concrete and authorizes relief for a much broader range of defendants. Indeed, relief can only be denied when the defendant presents a risk that he will commit a "violent felony" such as homicide or child molestation. (Penal Code section 667, subd. (e)(2)(C)(iv).) Since the trial court effectively applied the wrong legal standard, a new hearing is required. (*People v. Butcher* (1986) 185 Cal.App.3d 929, 936-937 [reversal is required when the trial court applied the wrong legal test in the first instance].)

The electorate has directed that section 1170.126 proceedings are to be governed by a new and more generous standard which will allow for relief for more prisoners. This court should order a new hearing so that the trial court will have an opportunity to apply the new definition of "unreasonable risk of danger to public safety."

CONCLUSION

For the reasons stated above, the judgment should be reversed with directions that a new hearing be held in accordance with the new statutory definition of "unreasonable risk of danger to public safety."

Dated: November ____, 2014 Respectfully submitted,

_____
DALLAS SACHER
Attorney for Appellant,
Ernest Landry

CERTIFICATE OF COUNSEL

I certify that this brief contains 1,265 words.

Dated: November ____, 2014

_____
DALLAS SACHER
Attorney for Appellant,
Ernest Landry

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF*** to the following parties hereinafter named by:

_X_ **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

Christopher Wei, Esq.
Attorney General's Office
455 Golden Gate Avenue
Suite 11,000
San Francisco, CA 94102-7004
[attorney for respondent]
DOCKETING6DCASFAWT@DOJ.CA.GOV

_X_ **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Superior Court, Appeals Clerk
191 N. First Street
San Jose, CA 95113

Ernest Landry
H-81616
Kern Valley State Prison
P.O. Box 3130
Delano, CA 93216-6000

I declare under penalty of perjury the foregoing is true and correct. Executed this ____ day of November, 2014, at Santa Clara, California.

_____
Priscilla A. O'Harra