Filed 3/13/17 P. v. Franco CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO FRANCO, Defendant and Appellant.	B269287 (Los Angeles County Super. Ct. No. TA054828)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed and remanded.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Alberto Franco, also known as Antonio Chavez and by his gang monikers "Lefty" and "Beto," has been serving a three-strike sentence of 25 years to life for possession of methamphetamine since 2000. In 2013 he filed a petition for resentencing under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36 (Pen. Code, § 1170.126).[1] In 2015 he filed a petition for recall of his sentence under the Safe Neighborhoods and Schools Act, enacted by the voters as Proposition 47 (§ 1170.18). The trial court held a hearing on both petitions in 2015. The court denied Franco's Proposition 47 petition because it determined resentencing Franco would pose an unreasonable risk to public safety under section 1170.18, subdivisions (b) and (c), but the court did not rule on Franco's Proposition 36 petition. We affirm the court's order denying Franco's Proposition 47 petition and remand for the court to rule on Franco's Proposition 36 petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Franco's Petition Under Proposition 36*

On April 9, 2013 Franco filed a petition for recall of his sentence under Proposition 36. Franco alleged his current offense was a June 2, 2000 conviction for possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), for which he received a sentence of 25 years to life pursuant to the three strikes law. Franco asked

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1 Undesignated statutory references are to the Penal Code.

the court to sentence him as a second strike offender, and asserted he did not pose an unreasonable risk of danger to public safety under section 1170.126, subdivision (g). On April 19, 2013 the trial court issued an order to show cause.

B. *Franco's Petition Under Proposition 47*

On January 15, 2015 Franco filed a petition for resentencing under Proposition 47. Franco stated he had been convicted of a violation of Health and Safety Code section 11377, a felony that had since become a misdemeanor under Proposition 47. He also alleged that resentencing him would not pose an unreasonable risk of danger to public safety under section 1170.18, subdivision (c). On January 21, 2015 the court issued an order to show cause.

The People opposed the petition, conceding Franco appeared eligible for resentencing but arguing resentencing would create an unreasonable risk of danger to public safety under section 1170.18, subdivision (c). The People noted Franco had a pending Proposition 36 petition.

C. *The Evidence at the Hearing on the Petitions*

On October 8, 2015 the court conducted a hearing on both petitions. At the hearing, both sides called a prison gang expert to testify about the Mexican Mafia and Franco's involvement in it. The People's expert, Sergeant Javier Clift, was a 34-year veteran of the Los Angeles County Sheriff's Department, who had 17 years of experience conducting prison investigations of Mexican Mafia members and associates "within the jail system" and "out on the street." Sergeant Clift explained that in 2010 Franco was validated as a Mexican Mafia associate, which means

"he has direct contact with Mexican Mafia members." An associate is higher than a regular foot soldier or "camarada" but lower than a full member of the Mexican Mafia. Although only an actual member of the Mexican Mafia can order an assault or a "hit" on another inmate, Franco, as an associate, can order an assault or hit "if he gets authorization from an actual Mexican Mafia member." Franco works on behalf of the gang's "*llavero*" or "shot-caller" in the prison,[2] whom the Mexican Mafia gives the authority "to run the yard or run the facility." As a result of these activities with the Mexican Mafia, Franco has been housed in a Security Housing Unit since 2010.

Franco is also on a governing board of the Mexican Mafia, known as a "mesa" or table, not sanctioned by the prison authorities, that serves as a council to further the gang's objectives in the prison. Sergeant Clift explained that inmates "can go to this mesa and discuss problems that are occurring within the gang," and the council can "then take the information to a higher authority" within the Mexican Mafia and get instructions on how to resolve the issue. The mesa council is part of the Mexican Mafia's power structure that allows the Mexican

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[2] "The Mexican Mafia controls most of the street gangs in Hispanic neighborhoods in Southern California, as well as most of the Hispanic criminal activity in the prison system. Every Mexican Mafia member has a person, called a key-holder (in Spanish, *llavero*), underneath him whom the member has placed in charge of a certain neighborhood with full authority to conduct business for that member." (*Rodriguez v. Bitter* (S.D. Cal. 2015) No. 13-CV-962-LAB-KSC, 2015 WL 773137, at p. 3; see *U.S. v. Rosalez* (10th Cir. 2013) 711 F.3d 1194, 1199 [members of the Hispanic prison gang Sureños refer to the leader as the "*llavero*" or "shot-caller"].)

Mafia to resolve conflicts with other gangs. Participation in this council puts Franco at an elite level of the Mexican Mafia.

Franco has a record of prison rules violations related to his gang activities. In 2014 prison authorities discovered on Franco a bindle containing two "kites" or written notes used by those loyal to the Mexican Mafia to communicate with each other. One of the notes "was authored by an EME [Mexican Mafia] associate within" a Security Housing Unit, informing another inmate "of a new arrival" of another Mexican Mafia associate. The other note was a roll call or roster identifying active Mexican Mafia associates and loyal gang members housed at one of the prison's facilities, identifying the associate by first and last name, California Department of Corrections and Rehabilitation [CDCR] identification number, date of birth, gang moniker, commitment offense, and reason for placement in security housing. The roster listed inmates who are "active Mexican Mafia members, actual members, or associates, or other Southern Hispanic gang members that are loyal to the Mexican Mafia." The Rules Violation Report (RVR) for this violation stated that, by possessing this roll call or roster list, Franco was "evidencing his continued association, behavior, loyalty, and allegiance to the EME."[3]

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[3] An institutional gang investigator at the prison wrote that Franco "is maintaining the names [and] CDCR numbers of inmates in order to continue efforts to communicate gang information with persons identified on the pieces of paper. The individuals listed within [Franco's] address book have been identified as validated associates of the Mexican Mafia . . . . Inmates regularly maintain the names and CDCR numbers of other inmates throughout the [state], and by utilizing

Also in 2014 prison authorities discovered in Franco's personal property a copy of the Mexican Mafia "house rules" used "for the training and indoctrination of recruits into the policies of the" Mexican Mafia. The RVR for this violation explained, "The written material discovered in [Franco's] possession is commonly referred to as the 'house rules or reglas,' [and is] maintained by members and associates of the Mexican Mafia (EME) within each housing unit at correctional facilities. The EME utilize the house rules to maintain strict adherence to [its] policies and thereby control the Southern Hispanic population, referred to as 'Camaradas.' As stated within the rules, any Southern Hispanic failing to follow the rules outlined within the training material and identified by the EME member or associate maintaining control of the unit, will face discipline. The discipline is dependent upon the severity of the violation and may place the identified inmate in bad standing with EME and they are targeted for assault. [¶] The 'house rules' identify an organizational and regimented structure utilized by the EME to carry out [its] violent policies through fear and intimidation. By maintaining the 'house rules,' [Franco] is showing his allegiance and loyalty with the EME, as well as his good standing with the prison gang." The Senior Hearing Official in the prison concluded this violation had "a gang nexus" and was part of Franco's "prison

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the Inmate Central Locator System through family/friends on the streets, use these names and CDCR numbers to locate the inmate within the State facilities, and thereby relay gang related information to the inmate and maintain communications. Therefore . . . this document should be utilized as one source towards maintaining the active validation of [Franco] as an associate of the Mexican Mafia . . . ."

gang activities on behalf of . . . Mexican Mafia inmates." Franco's possession of the house rules allows him to "remain in contact and conduct criminal gang activities on behalf of the Mexican Mafia prison gang," and "shows that he is in a position of leadership amongst the Southern Hispanic inmate population [and] supports EME politics and follows all rules set forth by the EME."

Based on this evidence, Sergeant Clift opined that Franco was a danger to the community and, if released, would commit further gang-related crimes such as murder, attempted murder, and solicitation to commit murder on behalf of the Mexican Mafia. Noting that Franco never denied his involvement with the Mexican Mafia or requested debriefing,[4] Sergeant Clift explained, "Traditionally, if you are involved in the Mexican Mafia and you are not saying that you are not involved and you go back out on the streets, you will be involved in criminal activity. That is the life blood of the Mexican Mafia. They will go out and start intimidating. They will kidnap people, torture people, commit murder, solicit for murder. They will be involved in murders. That is what they do." Commenting on Franco's plans to live in Compton and work as a truck driver if released, Sergeant Clift stated driving a truck would make it easier for Franco to commit crimes for the Mexican Mafia, including making threats to commit murder. Sergeant Clift further explained that, as a Mexican Mafia associate, Franco would have authority, and in fact would be required, "to control the Hispanic gangs by taxing them and directing them on what they want done out in that

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[4] "Debriefing" is a formal process for demonstrating that an inmate has ended his active membership in a prison gang. (*In re Fernandez* (2013) 212 Cal.App.4th 1199, 1217.)

area." And because Franco is an older Mexican Mafia associate, younger gang members would consider him "a wise man within the criminal organization" and look up to him, which would put Franco in a position to direct local gangs to complete "the criminal tasks that the Mexican Mafia wants done, whether it's extortion, robbery, murders, attempt[ed] murders, the sales of narcotics, and the involvement of other crimes."

Franco's expert, Richard Subia, was a "public safety consultant providing expert testimony and consultation to public safety agencies" who had training and experience investigating criminal street and prison gangs, including involvement in over 500 prison gang validations and debriefings. Subia's knowledge and experience included "the operation of prison, prison culture, prison disciplinary process, and assessing risk, both in custody and in the community." He testifies only for petitioners in Proposition 36 cases.

Subia acknowledged Franco is a validated associate of the Mexican Mafia, but he believed Franco's rules violations "are not inconsistent with what you would see in a prison setting," and Subia "didn't see anything in those violations" indicating "a potential for ongoing violence by [Franco]." According to Subia, "There are prison rules that are controlled by the prison system. There are prisoner rules that are controlled by the prisoners. Each has its own set of violations. Each has its own set of discipline." Subia opined Franco's prison gang activity did not make him a current danger to society because some of his rules violations involved conduct that called attention to himself, and "an associate of the Mexican Mafia would not be drawing unneeded attention to himself because, number 1, he doesn't want it, and number 2, it's against the rules of the Mexican

Mafia." Subia concluded Franco did not pose unreasonable risk of danger to public safety and there was "less of a risk of him being violent as opposed to just committing crime per se."

D. *The Trial Court's Ruling*

In a 17-page memorandum of decision, the trial court denied Franco's petition under Proposition 47. Pursuant to section 1170.18, subdivision (b), the trial court considered, and made findings on, Franco's criminal history, Franco's disciplinary and rehabilitation record while incarcerated, and other evidence relevant to whether resentencing Franco would result in an unreasonable risk of danger to public safety. With respect to Franco's criminal history, the court noted his 1981 conviction for armed robbery involved a threat to kill the victim with an automatic weapon. The court also considered Franco's 1989 conviction for possession of a controlled substance, several probation violations, 1990 conviction for taking a vehicle without the owner's consent, 1991 conviction for possession of a firearm as a felon, 1993 conviction for petty theft with a prior, 1994 conviction for second degree robbery, burglary and grand theft, and 1999 conviction for possession of methamphetamine.

The court also reviewed Franco's history of prison discipline, which included 10 serious RVRs, and his limited participation in rehabilitative programming. Franco's RVRs indicated two 2014 violations for possessing Mexican Mafia materials and the roster of active Mexican Mafia associates, two 2009 violations for disobeying orders, a 2007 violation for mutual combat, two 2005 violations for misuse of property and willfully obstructing a peace officer, a 2004 violation for conspiracy to traffic or distribute a controlled substance in prison, and a 2002

violation for introducing contraband into the prison. The court also noted Franco had only "completed a limited amount of rehabilitative programming.

The court summarized Franco's involvement with the Mexican Mafia in prison: "[Franco] was validated as an active associate of the Mexican Mafia Security Threat Group ('STG') on June 25, 2010. . . . Confidential information indicated [Franco] was part of a Mexican Mafia governing body . . . . [Franco] was placed in administrative segregation on May 27, 2010, pending the investigation into his connection with the Mexican Mafia. After [Franco] was validated as a Mexican Mafia associate, [he] was placed in the Security Housing Unit ('SHU') for an indeterminate term on March 9, 2011. . . . On December 17, 2014, the classification committee elected to retain [Franco] in the SHU based on his status as an active Mexican Mafia associate." The court noted the prison authorities had advised Franco regarding "his avenues for release from the SHU" by going through the debriefing process, obtaining inactive gang member or associate status, and participating in the Step Down Program.[5] Franco, however, "declined to debrief" and never participated in the Step Down Program.

After reviewing this evidence, the court denied Franco's Proposition 47 petition, concluding that resentencing him would pose an unreasonable risk of danger to public safety under

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[5] The Step Down Program "is an avenue for validated gang members to obtain release from the SHU." It is "an individual behavior based program that provides graduated housing, enhanced programs, and interpersonal interactions," as well as "an opportunity for offenders to demonstrate their commitment and willingness to refrain from [gang] behavior . . . ."

section 1170.18, subdivisions (b) and (c). The court noted Franco had "an extensive criminal record that is marked by substance abuse" and includes a conviction for a violent felony, and a history of recidivism and violations of probation and parole. The court stated that, although Franco's convictions were remote, his involvement with the Mexican Mafia in prison created a causal link between those convictions and his current risk of danger.

Most significant in the court's analysis was the fact that Franco "is an active member of the Mexican Mafia," who was validated as an associate in 2010 but who had "ties to the Mexican Mafia as early as 2001." The court noted Franco "has sent out mail containing symbols associated with the Mexican Mafia, has tattooed himself with symbols associated with the Mexican Mafia, has received RVRs for possessing a roster of active Mexican Mafia associates and a copy of the Mexican Mafia's house rules, and confidential information indicated he was part of a Mexican Mafia governing body . . . ." Emphasizing the "Mexican Mafia is a particularly organized and ruthless criminal enterprise" that "wields an enormous amount of influence both inside and outside the prison system due to [its] violent means of gaining profit for itself as well as the manner in which it deals with people who stand in its way or attempt to leave its member or associate status," the court concluded that, "once a criminal like [Franco] has attained associate status, it becomes very difficult to leave this lifestyle even if one desires to leave it." The court found Franco's "continued association with the Mexican Mafia and refusal to participate in [the Step Down Program] or to debrief" was "clear evidence that [Franco] adheres to the gang lifestyle and mentality." The court stated that, because Franco "has been unable to disassociate himself from

gangs while in the strictest of environments, the SHU in state prison, it is not likely he will disassociate himself from gangs if released into the free community where he has scant educational or vocational prospects." The court also cited Franco's failure to engage in substance abuse, educational, or vocational programs.

The court ruled, "In sum, the totality of the evidence contained in the record demonstrates that resentencing [Franco] would pose an unreasonable risk of danger to public safety pursuant to the definition set forth in section 1170.18, subdivision (c) at this time due to his criminal history, disciplinary record, insufficient rehabilitative programming, continued gang involvement, and inadequate re-entry plans." The court therefore denied Franco's Proposition 47 petition under section 1170.18, subdivision (b). Although the court stated at the hearing, "this is a combined Proposition 36/Proposition 47 hearing," the court did not rule on Franco's petition under Proposition 36, stating its "decision only addresses [Franco's] petition under Proposition 47."

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Franco's Proposition 47 Petition on the Ground Resentencing Would Pose an Unreasonable Risk to Public Safety*

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera*

(2015) 233 Cal.App.4th 1085, 1091.) "'As summarized by the Legislative Analyst, the proposition "reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes" and "allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences."'" (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 742.)

"'Under section 1170.18, a person "currently serving" a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "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."' [Citation.] 'Section 1170.18 thus provides a two-step mechanism. . . . First, the trial court must determine if the petitioner is eligible for resentencing under section 1170.18 based on a preponderance of the evidence. [Citations.] If the court finds the petitioner eligible, the trial court must determine the factual issue of whether the petitioner presents an unreasonable risk of danger to public safety if resentenced.'" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1261-1262, fns. omitted; see *People v. Hronchak* (2016) 2 Cal.App.5th 884, 890, fn. 3 ["before resentencing an otherwise eligible petitioner, the court must determine whether resentencing would pose an unreasonable risk of danger to public safety"]; *People v. Johnson* (2016) 1 Cal.App.5th 953, 965, fn. 10 ["the court may still deny relief to an otherwise eligible petitioning defendant if the court determines,

based on evidence from any source, that resentencing would pose an unreasonable risk of danger to public safety"].)

"'Subdivision (c) of section 1170.18 defines the term "unreasonable risk of danger to public safety," and subdivision (b) of the statute lists factors the court must consider in determining "whether a new sentence would result in an unreasonable risk of danger to public safety."' [Citation.] "'[U]nreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 667, subdivision (e)(2)(C)(iv)].'" (*Hall*, *supra*, 247 Cal.App.4th at p. 1262, fn. omitted.)

"Section 667, subdivision (e)(2)(C)(iv) provides a list of felony offenses commonly known as 'super strikes.'" (*Hall*, *supra*, 247 Cal.App.4th at p. 1262, fn. 6.) The super strike felonies listed in that provision are: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon

of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death." (§ 667, subd. (e)(2)(C)(iv).)

"'The critical inquiry . . . is not whether the risk is quantifiable, but rather, whether the risk would be "unreasonable."'" (*Hall*, *supra*, 247 Cal.App.4th at p. 1262.) "'In exercising *its discretion*, the court may consider all of the following: [¶] (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. [¶] (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.'" (*Hall*, at p. 1262, quoting § 1170.18, subd. (b).)

The People have the burden of proving dangerousness under Proposition 47 by a preponderance of the evidence. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241.) Because "section 1170.18, subdivision (b), repeatedly refers to the trial court's discretion to determine that resentencing a petitioner would pose an unreasonable risk of danger to public safety," we review the trial court's denial of a Proposition 47 petition on the ground an eligible petitioner poses an unreasonable risk of danger to public safety for abuse of discretion. (*Hall*, *supra*, 247 Cal.App.4th at pp. 1263-1264.)

The People do not dispute Franco is eligible for resentencing under Proposition 47. He was sentenced in 2000 to a prison term of 25 years to life on his conviction of possessing

methamphetamine in violation of Health & Safety Code section 11377. (See *People v. Davis* (2016) 246 Cal.App.4th 127, 132 ["[a]mong other changes to California criminal law, Proposition 47 reduced a violation of Health and Safety Code section 11377, subdivision (a) to a misdemeanor"], rev. granted July 13, 2016; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1105 ["[w]ith the passage of Proposition 47 . . . violations of Health and Safety Code section 11377 became misdemeanors"].) The issue is whether the trial court abused its discretion in finding resentencing Franco would pose an unreasonable risk of danger to public safety.

It did not. The court considered the proper factors under section 1170.18, subdivision (b) (Franco's criminal history, his disciplinary and rehabilitative record, and other relevant evidence), and made findings on each. (See *Hall*, *supra*, 247 Cal.App.4th at p. 1265 [trial court "expressly considered each enumerated factor in exercising its discretion" under section 1170.18, subdivision (b)].) The court relied on the fact that some of Franco's convictions involved a firearm, including a threat to kill the victim of an armed robbery with an automatic weapon and possession of a firearm as a felon, and Franco's refusal to obey the law even when on parole or probation. The court observed Franco "has never successfully completed parole and was on parole at the time of the current commitment offense." The court acknowledged that some of Franco's criminal convictions were not recent, but balanced that fact against the fact his gang-related activities escalated during his time in prison

and his RVRs were as recent as 2014.[6] The court noted, "While a history of recidivism alone is an insufficient basis for a court's finding that a petitioner poses an unreasonable risk of danger to public safety, the multiplicity of prior convictions and the failure to comply with conditions of intervening periods of probation or parole give rise to a valid concern about a danger to public safety." The court found this is particularly true for Franco because, even though his convictions "may be remote in time," "there is a nexus between his previous criminal history and his current risk of danger to public safety because of his gang involvement in prison."

The court further considered Franco's limited efforts at rehabilitation, noting Franco had taken advantage of few of the programs and avenues for improvement available to him in prison. The court observed that Franco "completed only one substance abuse treatment program in 2000, and that he has not engaged in any other substance abuse programming despite his considerable substance abuse history." (Fn. omitted.) Nor, as the trial court noted, had Franco engaged in any significant educational or vocational programming during his incarceration.

The court also properly considered under section 1170.18, subdivision (b)(3), Franco's relatively high-ranking position as an associate of the Mexican Mafia. Criminal gangs like the Mexican Mafia exist to commit the kinds of crimes listed in section 667, subdivision (e)(2)(C)(iv), including homicide and attempted homicide, solicitation to commit murder, and serious or violent

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6 The court also commented that Franco incurred his last RVR "several months after [he] claimed in his Reply [in support of his Proposition 36 petition] that 'he has no interest in participating in gang activity.'"

felonies that can be punishable in California by life imprisonment or death. (See *U.S. v. Martinez* (9th Cir. 2011) 657 F.3d 811, 815 ["the Mexican Mafia has survived for half a century" and "enforces its will by violence including murder"]; *Vasquez v. Thaler* (W.D. Tex. 2012) 2012 WL 2979035, at p. 23 ["any reasonable person would expect a member of the Mexican Mafia to . . . follow the orders of higher level officials in that organization and commit criminal acts of violence"]; Joyce, *Stars, Dragons, and the Letter "M": Consequential Symbols in California Prison Gang Policy* (2016) 104 Cal. L.Rev. 733, 739-740 ["[i]n California, prison gangs threaten safety both within and beyond prison walls," and "prison gangs have directed street gangs within their control to collaborate with drug cartels, and to assault or kill on the prison gang's behalf"]; Rafael, *The Mexican Mafia* (2007) p. 34 [penalty for failure to pay taxes to the Mexican Mafia is death]; Mastin, *RICO Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process* (2001) 27 Wm. Mitchell L. Rev. 2295, 2302 ["[t]he Mexican Mafia condones murder as a means to further its existence"]; cf. *U.S. v. Krout* (5th Cir. 1995) 66 F.3d 1420, 1427-1428 [Texas Mexican Mafia, "[b]y its written constitution," defines "itself as criminals dealing in drugs, contract killings, prostitution, large scale robbery, gambling, weapons, and 'in everything imaginable'"].) As the trial court found, "Involvement in prison and street gangs necessarily means being involved in the commission or attempted commission of at least some of the offenses listed in" section 667, subdivision (e)(2)(C)(iv).

The decisions (in 2010) to house and (in 2014) to keep Franco in the SHU reflect the CDCR's view that Franco is dangerous even in prison; there is no reason to believe he will be

any less dangerous in the general public. (See *Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1005 ["Security Housing Unit is an extended term placement designated for an inmate whose conduct endangers the safety of others or the security of the institution"]; cf. *People v. Jefferson*, *supra*, 1 Cal.App.5th at pp. 243-244 [trial court properly considered Proposition 47 petitioner's placement in administrative segregation in prison and writing of a "kite" indicating his loyalty to his gang].) There was evidence that inmates involved with the Mexican Mafia, if they are released from prison, will commit or solicit murders. As Sergeant Clift put it in describing associates of the Mexican Mafia, "That is what they do."

Sergeant Clift also explained that Franco would be in a position to commit these kinds of crimes for the Mexican Mafia because after release Franco "would keep [in] constant contact with members of the Mexican Mafia on what they wanted done in the area he's going to be living in. And then he would direct the Southern Hispanic Gang Members that pay homage to the Mexican Mafia to complete the . . . criminal tasks that the Mexican Mafia wants done, whether it's extortion, robbery, murders, attempt[ed] murders, the sales of narcotics, and the involvement of other violent crimes."[7] Sergeant Clift testified

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[7] Although the trial court stated in its decision that Sergeant Clift "was not particularly helpful" because he "performed no independent investigation into [Franco's] ties to the Mexican Mafia," and that the court purported to give his testimony "little weight in reaching its decision," the court relied on at least part of his testimony. (See *In re Daniel G.* (2004) 120 Cal.App.4th 824, 830 ["the trier of fact may believe and accept as true only part of a witness's testimony and disregard the rest," and "[o]n

that Franco, if released, "would have power over all . . . the Hispanic gangs" in the Compton area where he planned to live. In addition, as the trial court noted, Franco's "post-release plans are tenuous at best," which means that, "[w]ithout a solid and reliable re-entry plan upon release, the risk of [Franco] re-offending in the community just to survive is greatly increased."

The trial court did not abuse its discretion in finding resentencing Franco would pose an unreasonable risk of danger to public safety. There is no basis for reversing the court's order denying Franco's petition under Proposition 47.

B. *Franco Is Entitled to a Ruling on His Proposition 36 Petition*

As noted, the trial court's December 1, 2015 memorandum of decision did not rule on Franco's Proposition 36 petition, and the court even stated its decision was limited to Franco's Proposition 47 petition. There is no ruling on Franco's Proposition 36 petition in the record.

The People point to an April 4, 2016 minute order stating the court had denied Franco's "petition for recall of sentence pursuant to . . . section 1170.126 [i.e., Proposition 36] on December 1, 2015." This appears to be a mistake. The court's December 1, 2015 order denied only Franco's Proposition 47 petition. Therefore, the court still needs to rule on Franco's Proposition 36 petition.

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appeal, we must accept that part of the testimony which supports the judgment"].)

DISPOSITION

The December 1, 2015 order denying Franco's Proposition 47 petition is affirmed. The matter is remanded for the trial court to rule on Franco's Proposition 36 petition.

SEGAL, J.

We concur:

PERLUSS, P. J.

SMALL, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.