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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RODNEY FERNANDEZ, Defendant and Appellant.	B281897 (Los Angeles County Super. Ct. No. KA032765)

APPEAL from an order of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Nancy Tetrault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rodney Fernandez challenges the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126 (Proposition 36).[1] He contends that Proposition 36 created a due process liberty interest in resentencing, as well as a rebuttable presumption in favor of resentencing. He also contends that the standard guiding the trial court's discretion—whether the petitioner poses an "unreasonable risk of danger to public safety"—is void for vagueness, and that the trial court abused its discretion in determining that he posed such a risk. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

I. Offenses of Conviction

On July 12, 1996, appellant stole a 1980 Honda Civic from a residential street in La Puente. Two days later, he drove that stolen car to Whittier, where he broke into a 1989 Mazda MX-6. Appellant ransacked the interior of the Mazda and took various items from it.

After a jury trial, appellant was convicted of one count of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), one count of burglary of a vehicle (§ 459), and one count of attempted grand theft of a vehicle (§§ 487h, subd. (a) & 664). In accordance with the Three Strikes law, the trial court sentenced appellant to a prison term of 25 years to life for the burglary of the Mazda, followed by a consecutive term of 25 years to life for the unlawful driving or taking of the Honda, and imposed and stayed a third 25-years-to-life sentence for the attempted grand theft of the Mazda pursuant to section 654. We affirmed

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

appellant's convictions and sentence on direct appeal. (*People v. Fernandez* (Feb. 26, 1998, B110095) [nonpub. opn.].)

II. Proposition 36 Proceedings

A. Proposition 36

In November 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012. Proposition 36 amended sections 667 and 1170.12 to limit the imposition of a Three Strikes sentence to serious or violent felonies. (See *People v. Valencia* (2017) 3 Cal.5th 347, 350.) It also added section 1170.126, which allows an eligible inmate serving an indeterminate life sentence for a third strike offense that was neither serious nor violent to petition for resentencing in accordance with the new sentencing provisions in sections 667 and 1170.12. (*Ibid.*; see § 1170.126, subd. (b).) The resentencing provision states that an eligible inmate "shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

B. Petition

Appellant filed a petition for recall of his sentence and resentencing on March 15, 2013. The trial court found appellant made a prima facie showing of his eligibility for resentencing and issued an order to show cause why his petition should not be granted. The district attorney filed an opposition brief in October 2013, in which it argued that appellant posed an unreasonable risk of danger to public safety due to his lengthy criminal history, two prison felonies, and numerous violations of prison rules. The

trial court subsequently appointed an expert for appellant and set the matter for a suitability hearing.

C. Hearing

Due to various continuances and delays, the hearing was not held until February 23, 2017. Appellant was 50 years old by that time.

When considering whether a petitioner is suitable for resentencing under Proposition 36, the trial court is permitted to consider three broad categories of information. "(1) The petitioner's criminal 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 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." (§ 1170.126, subd. (g).) The prosecution bears the burden of proving, by a preponderance of the evidence, that a petitioner would pose an unreasonable risk of danger if he or she were to be resentenced. (*People v. Frierson* (2017) 4 Cal.5th 225, 239.)

1. Prosecution Evidence

The district attorney introduced 26 exhibits, all of which the trial court admitted into evidence. The exhibits exhaustively documented appellant's lengthy criminal history and conduct while incarcerated.

a. Criminal History

Appellant suffered his first misdemeanor conviction in 1985, when he was 19, for being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). In 1987, he was convicted of misdemeanor assault with a deadly

weapon (§ 245, subd. (a)(1)). In 1988 and 1990, he again suffered misdemeanor convictions for controlled substance use (Health & Saf. Code, § 11550, subd. (a)). The record–a CLETS printout–says 1988 and 1990. In 1989, appellant was convicted of misdemeanor assault with a deadly weapon (§ 245, subd. (a)(1)) and petty theft (§ 484, subd. (a)). In 1990, appellant suffered a second misdemeanor conviction for petty theft (§ 484, subd (a)).

Appellant suffered his first felony conviction, for robbery, in 1990 (§ 211). Shortly after his release from prison, in 1991, appellant robbed a Winchell's Donuts while armed with a screwdriver (§ 211). Approximately two weeks later, he robbed the same donut shop, again while brandishing a screwdriver (§ 211). Three days after that, appellant robbed a 7-Eleven convenience store (§ 211). Appellant pled guilty to all three robberies and related weapons enhancements (§ 12022, subd. (b)) in September 1991 and was sentenced to eight years in prison.

Appellant was paroled in 1996. He committed the instant offenses, unlawful taking or driving of a vehicle, burglary of a vehicle, and attempted grand theft auto, while on parole.

b. Prison Discipline

During his current term of incarceration, appellant has committed 13 serious rule violations. In 2000, he and a group of other inmates attacked an inmate whom guards were escorting through the prison. After a disciplinary hearing, appellant was found guilty of "Active Participation in Condition Likely to Threaten Institutional Security."

Appellant amassed three more serious rule violations and two felony convictions as a result of an incident in October 2002. A correctional officer observed appellant and his cellmate injecting themselves with a substance later determined to be

heroin. Appellant pushed the officer's arm out of the way and knocked him to the ground while attempting to flush the heroin down the toilet. The officer later complained of elbow and back pain, as well as a possible needle puncture. Appellant refused demands to submit to a urine test. After a disciplinary hearing, appellant was found guilty of possessing a controlled substance, battery on a peace officer, and refusing to provide a urine sample. He also was criminally prosecuted for battery on a prison guard (§ 4501.5) and possession of a controlled substance in prison (§ 4573.6). He pled no contest to the possession offense and was sentenced to four additional years in prison.

In April 2003, appellant manufactured alcohol in his cell. In October 2003, he participated in a riot after engaging in a fistfight with nine other inmates. He was found guilty of both offenses after disciplinary hearings.

After remaining discipline-free for more than a year, appellant committed several offenses in 2005 and 2006; he was found guilty of each offense after disciplinary hearings. In February 2005, he possessed an "inmate manufactured weapon rolled up in plastic in the crotch flap" of his shorts. Just a few days later, appellant appeared at another disciplinary hearing and was found guilty of conspiracy to introduce narcotics into the prison after a holiday card addressed to him was found to contain methamphetamine. In June 2005, he engaged in mutual combat with his cellmate and was found guilty at a disciplinary hearing. A few weeks later, at another hearing, he was found guilty of obstructing a peace officer when he refused to accept a new cellmate. In April 2006, he failed to report to church to gain access to a certain prison yard and was found guilty of the offense at a disciplinary hearing.

In March 2008, appellant and another inmate attacked a third inmate "about the head and upper torso" with "inmate manufactured weapons" made of sharpened copper tubing. The victim suffered puncture wounds and slashes to his face, back, and forearms. Appellant initially was cited for attempted murder, but after a disciplinary hearing was found guilty only of the lesser included offense of battery on an inmate with a weapon. Appellant also was criminally prosecuted for assault with a deadly weapon (§ 245, subd. (a)(1)). He pled guilty and was sentenced to an additional four years in prison.

Appellant's final disciplinary hearing occurred in January 2012. He was found guilty of participating in a riot that involved all inmates on the yard.

c. Placement Score

Inmates are placed into institutions and programming based upon their "placement score." (See Cal. Code Regs., tit. 15, § 3375, subd. (c).) "A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs." (Cal. Code Regs., tit. 15, § 3375, subd. (d).) When appellant's current incarceration began, in April 1997, he was assigned a score of 91. His score initially declined, reaching a nadir of 45 in October 2002. It then began rising and reached a peak of 159 in 2008. Appellant's score stayed in the 150-range until April 2013, when it began a steady decline. The most recent score in the record, from 2016, was 117.

d. Gang Affiliation

In 1997, appellant informed a correctional officer that he was a member of the Bassett Grande street gang. He remained a member of the gang until July 31, 2013, when he renounced his membership.

2. Appellant's Evidence

a. Expert Testimony

Appellant presented the testimony of Richard Subia, a public safety consultant whose expertise in the area was stipulated. Subia interviewed appellant and reviewed his prison records. Subia testified that appellant previously posed an unreasonable risk of danger, but turned his life around in 2013 by renouncing his gang membership and securing placement in a special needs housing unit with more programming opportunities. Appellant began participating in work and substance abuse programs, got a job in the prison's medical department, and obtained "several laudatory chronos from his supervisors regarding his participation in program[s] and the value he brings to the job that he does."[2] In light of these recent strides and achievements, Subia opined, appellant did not currently pose an unreasonable risk of danger to public safety.

On cross-examination, Subia testified that appellant's behavior prior to his departure from the gang was "atrocious." Subia acknowledged that appellant committed multiple strike offenses—the robberies—while outside prison and "never really successfully completed probation or parole." He also testified that appellant could have requested placement in the special needs housing unit at any time during his incarceration rather than waiting until 2013. Thus, instead of obeying the commands

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[2] The term "chrono" refers to California Department of Correction and Rehabilitation forms used to document information about inmates and inmate behavior. Custodial counseling chronos document minor misconduct (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2)), while general chronos document other information. (Cal. Code Regs., tit. 15, § 3000.)

of prison gang "shot callers" to engage in violent incidents, appellant could have requested special needs housing to avoid them.

Subia conceded that appellant's 2008 stabbing incident was a serious and violent offense that resulted in a felony conviction and strike. He further conceded that prison officials deemed appellant "an unacceptable risk . . . in a community or housed with other inmates in a supervised setting" as a result of that incident. Subia also reiterated his opinion that appellant posed an unreasonable risk of danger to public safety prior to his 2013 turnaround, but no longer did so. Subia disagreed with the deputy district attorney's suggestion that appellant's turnaround was prompted by Proposition 36; he stated that there were "some other factors that indicate . . . his reasons for going to [special] needs."

During redirect examination, Subia explained that gang members generally are reluctant to request housing in special needs yards because they do not want to be perceived as "rats" or be "greenlighted" by prison gangs. He further stated that such placement requests can in some cases, "depending on your reason for going in," place an inmate's family members in jeopardy.

b. Appellant's Testimony

Appellant testified that he joined the Bassett Grande street gang when he was 12. He maintained his gang affiliation in prison and was "pushed" into committing the 2008 stabbing by a superior gang member. He felt his life would be in danger if he disobeyed the order. When asked why he committed the assault rather than request placement in the special needs yard, he explained, "you don't want to become something that is going to follow you for the rest of your life and be known as somebody

that's going to always be running from people that want to get you."

Eventually, though, appellant decided to change his life, for his family. He asked to be placed on the special needs yard "to take full responsibility and become a man and stand on my own two feet and do my time." He was "not completely" aware that Proposition 36 had passed at the time; he learned of Proposition 36 after he applied to the special needs yard and dissociated from his gang.

Appellant also testified that he was plagued by a "serious drug problem" in prison. That is why he was injecting heroin with his cellmate in 2002. Appellant testified that he "never struck" a correctional officer during that incident. Instead, he explained, the officer slipped on coffee that appellant knocked over while trying to flush the heroin down the toilet. Appellant testified, "They said that I didn't strike him. It was pretty much I copped out to a plea deal." Appellant introduced evidence that he recently had made efforts to resolve his substance abuse issues, including a 150-day Narcotics Anonymous participation certificate dated May 18, 2016 and a 150-day Alcoholics Anonymous participation certificate dated June 7, 2016.

After appellant moved to the special needs yard, he began receiving vocational training. He completed a 20-hour safety training orientation for healthcare facilities maintenance in October 2014 and later received training in cleaning chemicals and maintaining floors and other surfaces. He started a job working in the prison's healthcare department and received laudatory "chronos" from his supervisors. One such chrono, dated June 10, 2014, stated that appellant "has followed direction at all times, has shown the utmost respect to all staff in his

vicinity, and never misses a day of scheduled work. He takes pride and personal initiative in making D Medical Clinic immaculately clean." Appellant testified that he planned to "come back and be a supervisor" at the same facility if he were released.

Appellant also reached out to two placement programs that could house him if he were released. One of the programs, a "residential educational organization for former alcoholics, drug addicts and convicts," tentatively accepted him, "pending any unknowns found during the final interview at our facility the day of entry." Appellant additionally testified that he was working on earning his G.E.D. Appellant considered himself a different person since 2013, "completely changed for the better." He testified that he felt "good about all the things that I have been doing, and I do hope that I can get a second chance, go back out there, a life and work and have things with my family, be able to see them and make it all good for myself in my life."

D. Ruling

The trial court denied appellant's petition in a written ruling. It noted that appellant's "multiplicity of . . . prior convictions and his inability to refrain from re-offending while in the community constitute present and relevant concerns only if other evidence in the record provides a nexus between Petitioner's criminal past and his current dangerousness." The court found such a nexus despite the remoteness of appellant's prior offenses "because of his disciplinary history, lack of rehabilitative programming and lack of concrete parole plans." The court found that appellant "failed to comply with the rules and regulations of the [California Department of Corrections and Rehabilitation] even within the strict confinement of the prisons,"

amassing 13 serious rule violations and two felony convictions during his 20-year incarceration. It further found that his "good behavior only started recently in the last few years," after the passage of Proposition 36, and that he "has not shown much advancement in vocational skills training, self-help programming and has yet to obtain his GED." The court also found that appellant's post-release plans were "almost non-existent," which concerned the court "in light of [his] lack of sustained substance abuse or self-help programming." The court was "unconvinced that [appellant] would be able to support himself by honest means if released from custody," and noted that he "has not been able to refrain from committing crimes his entire adult life and has been unable to transition to a crime-free life."

DISCUSSION

I. No Presumption of Suitability

Section 1170.126, subdivision (f) provides that an eligible petitioner "shall be resentenced" as a second-strike offender "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Appellant argues that this provision changed the "spirit" of the Three Strikes law and created a presumption that a person who is eligible for relief also is suitable for relief. Our sister courts have rejected this claim, and we join them.

As cogently explained in *People v. Buford* (2016) 4 Cal.App.5th 886, 901-903 (*Buford*) and *People v. Esparza* (2015) 242 Cal.App.4th 726, 738 (*Esparza*), the "'shall'/'unless' formulation employed by the statute" does not create a mandatory presumption. (*Buford*, *supra*, 4 Cal.App.5th at p. 901.) Both cases relied on the Supreme Court's discussion of a

similarly constructed statute, section 190.5, subdivision (b),[3] in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1371: "It is not unreasonable to read this text . . . to mean that a court 'shall' impose life without parole unless 'at the discretion of the court' a sentence of 25 years to life appears more appropriate. [Citation] But it is equally reasonable to read the text to mean that a court may select one of the two penalties in the exercise of its discretion, with no presumption in favor of one or the other. The latter reading accords with common usage. For example, if a teacher informed her students that 'you must take a final exam or, at your discretion, write a term paper,' it would be reasonable for the students to believe they were equally free to pursue either option. The text of section 190.5[, subdivison](b) does not clearly indicate whether the statute was intended to make life without parole the presumptive sentence."

The same reasoning can be applied to section 1170.126, subdivision (f). Because a reading that affords no presumption "accords with common usage" (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1371), the voters did not necessarily intend there to be a presumption in favor of resentencing. "A court considering whether to resentence an eligible petitioner under section 1170.126, subdivision (f) has circumscribed discretion in the sense it can only refuse to resentence if it finds that to do so

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[3] Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

would pose an unreasonable risk of danger to public safety on the facts of the particular case before it. This does not mean, however, its discretion is circumscribed in the sense it can only find dangerousness in extraordinary cases. To the contrary, it can do so in any case in which such a finding is rational under the totality of the circumstances." (*Buford*, *supra*, 4 Cal.App.5th at pp. 902-903, footnote omitted.)

Appellant urges us to reject this reasoning because the rulings of other appellate courts are not binding on this one. Appellant is correct that decisions of one appellate court are not binding upon another court of the same level. (*Henry v. Associated Indemnity Corp.* (1990) 217 Cal.App.3d 1405, 1416.) However, they are often quite persuasive, particularly when they rely upon an analogous Supreme Court decision that *is* binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant also asserts that these cases do not preclude his interpretation of the statute. To the contrary, he asserts that the cases "conceded that the interpretation advanced by appellant is a reasonable interpretation of section 1170.126." Whether appellant's interpretation is reasonable is not the relevant question before this court. The question is whether the voters intended to incorporate a mandatory presumption into Proposition 36. (See *People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1369.) In making that determination, we give the language its usual and ordinary meaning and choose the construction that aligns most closely with the apparent intent of the lawmakers. (*Ibid.*) We agree with *Buford* and *Esparza* that the intent of the voters was not to create a mandatory presumption.

The court in *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1302-1303 reached the same conclusion, though by different reasoning, as it predated *People v. Gutierrez*. In *Kaulick*, the court explained, "dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced. [¶] The maximum sentence to which [a petitioner] is subject was, and always shall be, the indeterminate life term to which he was originally sentenced. While Proposition 36 presents him with an opportunity to be resentenced to a lesser term, unless certain facts are established, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury. Kaulick would interpret the retrospective part of the Act to mean that every petitioner who meets the eligibility requirements for resentencing is immediately entitled to the recall of his or her sentence, with resentencing to a second-strike term the presumptive sentence, and resentencing to the current third-strike term available only on proof beyond a reasonable doubt of the additional factor of dangerousness. There is nothing in the statutory language to support this interpretation." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1303, footnote omitted.)

Appellant, who cited *Kaulick* in support of his position in his opening brief, contends it is distinguishable because the decision "was made in response to the argument that Proposition 36 requires any ruling on dangerousness 'be submitted to a jury, and proved beyond a reasonable doubt.'" This is too narrow a reading of Kaulick's argument; like appellant here, he "argues that, once the trial court concluded that he was *eligible* for resentencing under the Act, he was subject *only* to a second-strike sentence, *unless* the prosecution established dangerousness." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1302.)

II. No Due Process Violation

Appellant next contends that Proposition 36 creates a state and federal constitutional due process liberty interest in resentencing. He relies on *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) 442 U.S. 1 and *Board of Pardons v. Allen* (1987) 482 U.S. 369, both of which held that statutory parole schemes can create a due process liberty interest in release. Even if we assume for the sake of argument that Proposition 36 gives rise to an analogous liberty interest—a conclusion with which we do not necessarily agree—appellant has not demonstrated that he was deprived of due process here.

Appellant acknowledges that "federal due process is satisfied when the prisoner is given notice of the resentencing hearing and an opportunity to be heard," as well as a statement of reasons if resentencing is denied. We agree. (See *Kaulick*, *supra*, 215 Cal.App.4th at pp. 1297-1300.) He further asserts that due process requires the prosecution to prove by a preponderance of the evidence facts from which the court can assess a petitioner's risk of danger, and that such finding lies within the trial court's discretion. All of these requirements were

satisfied in this case. Appellant received a noticed hearing, at which he was present, represented by counsel, and afforded the opportunity to provide testimony and other evidence in support of his petition. The trial court held the prosecution to a preponderance of the evidence standard and thoroughly explained its findings in a written ruling. As we discuss more fully below, the trial court did not act in an arbitrary or capricious manner in conducting the hearing or issuing its ruling. Appellant accordingly received the due process to which he claims he was entitled.

III. Proposition 36 is not Unconstitutionally Vague

Appellant contends that the phrase "unreasonable risk of danger" in section 1170.126, subdivision (f) is impermissibly vague because it does not distinguish between reasonable and unreasonable risks. He further contends that section 1170.126, subdivision (g) compounds the problem. That subdivision sets forth three broad categories of evidence the trial court may consider when making its discretionary determination of whether resentencing a petitioner would pose an unreasonable risk of danger to public safety: "(1) The petitioner's criminal 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 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." (§ 1170.126, subd. (g).) Appellant argues "the third catch-all category renders any predictability created by the first two categories meaningless" and allows "each

individual court to develop its own standard in defining an unreasonable risk of danger." We disagree.

As with appellant's argument regarding the presumptive nature of Proposition 36, multiple courts of appeal have considered and rejected the contention that section 1170.126, subdivision (f) is void for vagueness. In *People v. Garcia* (2014) 230 Cal.App.4th 763, 769, which our Supreme Court cited in *People v. Valencia* (2017) 3 Cal.5th 347, 355-356, the court explained that the meaning of the phrase "'unreasonable risk of danger to public safety'" was clarified by the examples of evidence enumerated in section 1170.126, subdivision (g). The court found that subdivision (g) "enumerates the factors the court may consider in exercising its discretion." (*People v. Garcia*, *supra*, at p. 769.) The *Garcia* court also rejected the appellant's contention that the term "unreasonable" is inherently vague, citing numerous instances in which "'"a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial,' and the like. . . . [S]tandards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.'" [Citation.]" (*People v. Garcia*, *supra*, 230 Cal.App.4th at pp. 769-770.) It held that "the meaning of the term 'unreasonable risk of danger to public safety' is clear because it can be objectively ascertained by reference to the examples of evidence the trial court may consider in making this determination." (*Id.* at p. 770.)

Appellant contends that a more recent U.S. Supreme Court case, *Johnson v. United States* (2015) 135 S.Ct. 2551 (*Johnson*) undermines this analysis. *Johnson* held that the residual clause of the federal Armed Career Criminal Act, which defined the

term "violent felony" to mean a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," was unconstitutionally vague. (*Johnson*, *supra*, 135 S.Ct. at p. 2557.) The Court explained that the statute impermissibly "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements."[4] (*Ibid.*) It reasoned that the statute accordingly gave rise to "grave uncertainty" about how to estimate the risk posed by a crime because it was unclear how to determine the type of conduct involved in an "ordinary case" of a crime. (*Ibid.*) The Court further found similarly vague the residual clause's "imprecise" formulation, "serious potential risk of physical injury." (*Id.* at p. 2558.)

Johnson is distinguishable. Section 1170.126, subdivisions (f) and (g) do not require the trial court to imagine an "ordinary case" against which to measure the petitioner's suitability for resentencing. Instead, they tie the determination to the petitioner's criminal history and prison disciplinary record. The so-called "catch-all" provision in subdivision (g) likewise does not require the court to imagine anything; rather, it gives the court the discretion to consider both positive and negative evidence pertaining to the petitioner's behavior and risk, such as family support and his or her post-release plans. This provision clarifies

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[4] *Johnson* overruled *James v. United States* (2007) 550 U.S. 192, 208, which held that the "proper inquiry" for a court determining whether an offense came within the residual clause was "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."

the trial court's discretion relating to the admission of evidence in Proposition 36 proceedings; it does not afford it the opportunity to "develop its own standard in defining an unreasonable risk of danger."

IV. The Trial Court did not Abuse its Discretion

Appellant's final contention is that the trial court abused its discretion in denying his petition. We disagree.

"Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.) We view the record in the light most favorable to the trial court's ruling and limit our inquiry to determining whether a rational trier of fact reasonably could conclude that appellant poses an unreasonable risk of danger to public safety. (See *Buford*, *supra*, 4 Cal.App.5th at p. 903.)

Appellant contends the trial court gave undue weight to immutable factors, such as his prior criminal history and prison disciplinary record, and insufficient weight to factors indicating he no longer poses a risk to public safety, such as his rehabilitative efforts, positive job performance, and Subia's favorable expert opinion. He further asserts the trial court improperly questioned the timing and sincerity of his behavioral turnaround and made adverse findings based on its "low opinion of appellant, rather than the evidence in the record."

The detailed ruling of the trial court does not support appellant's assertion that the trial court misapplied the

governing legal principles to the facts of this case. The trial court recognized that "the proper focus" of its assessment was "whether the petitioner *currently* poses an unreasonable risk of danger to public safety." (*Esparza*, *supra*, 242 Cal.App.4th at p. 746, citing *In re Lawrence* (2008) 44 Cal.4th 1181, 1214 and *In re Shaputis* (2008) 44 Cal.4th 1241, 1254.) Further, the trial court considered whether there was a nexus between appellant's relatively remote criminal history and concluded there was, based on his extensive prison disciplinary history, limited participation in rehabilitative programming, and lack of "solid and reliable" post-release plans.

Appellant's lengthy record of serious misbehavior in prison, including an incident in which he stabbed a fellow inmate in the face with a homemade weapon, "constitutes evidence of [his] willingness to engage in serious rule breaking behavior despite having received a criminal sanction." (*In re Rozzo* (2009) 172 Cal.App.4th 40, 60.) While his early misconduct "has decreasing probative value of his current dangerousness in light of intervening good behavior, such misconduct continues to have some probative value as to [appellant's] recidivist tendencies." (*Ibid.*) The trial court appropriately relied on this evidence, which is one of the categories enumerated in section 1170.126, subdivision (g), in assessing appellant's suitability for resentencing.

The trial court also was entitled to question appellant's credibility and the sincerity of his transformation. Credibility is a matter within the province of the trial court, and we do not revisit its determinations. (See *People v. Lee* (2011) 51 Cal.4th 620, 632.) Appellant testified that he did not know Proposition 36 existed when he requested placement on the special needs yard despite having filed his petition for resentencing nearly four

months earlier. He also declined to accept responsibility for injuring a correctional officer during the 2002 heroin incident. The failure to gain insight or understanding into one's behavior "is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety. [Citations.]" (*In re Shaputis* (2011) 53 Cal.4th 192, 218.)

Appellant contends the trial court erroneously found his post-release plans inadequate. He points to his acceptance into the transitional home and his lauded job skills. The trial court acknowledged these factors but further observed that appellant's housing plans were tentative, that he had proffered no evidence of family or financial support, and that he had not yet earned his G.E.D. despite having the opportunity to do so while incarcerated. The court also emphasized appellant's belated entry into substance abuse programming—more than a year after he filed his petition, and the limited 150-day duration of his successful participation.

The trial court did not abuse its discretion. The evidence viewed as a whole and in the light most favorable to the trial court's ruling supports its finding that appellant poses an unreasonable risk of danger to public safety despite his recent efforts at reform.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.