Filed 4/2/18 P. v. Wright CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GLENN WRIGHT, Defendant and Appellant.	B280669 (Los Angeles County Super. Ct. No. VA022705)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed and Remanded.

Nancy L. Tetreault, 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, Senior Assistant Attorney General, Noah P. Hill and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Glenn Wright (defendant) was convicted on two counts of second degree burglary, and as a third strike offender, he was sentenced to fifty years to life in prison. Many years later, defendant filed Proposition 36 and Proposition 47 petitions to recall his sentence. The trial court denied both petitions based on its finding that resentencing defendant would pose an unreasonable risk of danger to public safety. We affirmed the denial of defendant's Proposition 36 petition in a prior opinion,[1] relying on the more permissive dangerousness standard that applies to Proposition 36 cases as contrasted with the Proposition 47 standard, namely, whether a defendant poses an unreasonable risk of committing certain especially serious or violent felonies. In this appeal from the denial of defendant's Proposition 47 petition, we conclude the difference in the two statutory standards is dispositive—under the restrictive standard of dangerousness that applies, defendant's Proposition 47 petition should have been granted.

I. BACKGROUND

A. Defendant's 1995 Sentencing

On May 18, 1995, a jury convicted defendant of two counts of second degree burglary (Pen. Code,[2] § 459). The charges were predicated on evidence that defendant took money from cash registers at two different Robinsons-May stores. In the second of these burglaries, defendant punched a security guard in the chest

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[1] *People v. Wright* (Jan. 19, 2018), B277814 [nonpub. opn.].

[2] Undesignated statutory references that follow are to the Penal Code.

when the guard grabbed the defendant's coat as he fled. Defendant continued to struggle with this guard and another guard until Sheriff's deputies arrived and subdued him with pepper spray. Defendant admitted he stole the money to buy cocaine base, and he stated he fought with the security guards because he did not want to return to prison.

The trial court presiding over the 1995 burglary prosecution found defendant had sustained prior serious or violent felony convictions, namely, conviction on three counts of second degree robbery in 1988, for which he received three years in state prison; and conviction on one count of second degree robbery in 1992, for which he received two years in state prison. Based on these prior convictions, defendant was sentenced to fifty years to life under the Three Strikes law.

B. Defendant's Proposition 47 Petition and the People's Opposition

In 2015, defendant petitioned to recall the sentence imposed for the 1995 felony burglary convictions and to redesignate those convictions as misdemeanors pursuant to section 1170.18, a statute enacted in 2014 as part of The Safe Neighborhoods and Schools Act (Proposition 47). Defendant argued there was no basis to find, in the words of section 1170.18, that there was an "unreasonable risk that [he] will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667" (§ 1170.18, subd. (c)),[3] which would make him "unsuitable" for resentencing.

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[3] As we describe in more detail *post*, "[t]he cited subdivision of section 667 identifies eight types of particularly serious or

Defendant emphasized he had no prior convictions for any of the offenses enumerated in the relevant subdivision of section 667.

The People opposed defendant's petition for resentencing. The People did not contest defendant's statutory eligibility for Proposition 47 relief, but argued instead that the trial court should find that recalling defendant's sentence would pose an unreasonable risk of danger to public safety.

The People presented a legal argument and a factual argument to contend defendant was unsuitable for resentencing. Legally, the People argued defendant posed a risk of committing a "super strike" crime because his prior serious or violent felony convictions made him eligible for an indeterminate Three Strikes law sentence and Proposition 47's definition of a super strike crime includes any crime for which the punishment provided is death or life in prison.[4] Factually, the People asserted defendant posed an unreasonable risk of committing a super strike crime when considering his criminal history, his conduct and rules violations while in prison, and his asserted lack of progress in rehabilitation programming.

Regarding defendant's criminal history, the People summarized his various crimes dating back to 1987. In February of that year, defendant was convicted of falsely identifying himself as a peace officer and sentenced to three days in county jail. In October 1987, defendant was convicted of receiving or

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violent felonies, known colloquially as 'super strikes.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 351 (*Valencia*).)

[4] The trial court rejected this argument in ruling on defendant's Proposition 47 petition, and the Attorney General does not continue to advance the argument on appeal.

concealing stolen property and placed on probation for two years. Two months later, and while on probation, defendant committed the first of his two prior robbery offenses. During that offense, his accomplice stopped a bartender from calling 911 (hanging up the phone and telling her, "Don't move, or you are dead, Bitch") and robbed two other women who were in the bar at the time. In March 1992, seven days after being discharged from parole (following his release from prison on the robbery conviction, a parole violation, and another intervening conviction), defendant committed his second robbery offense. On that occasion, he stole money out of a Sears cash register and resisted a store security guard who attempted to apprehend him. After being released from prison on this robbery conviction and sustaining an intervening cocaine possession conviction, defendant committed the 1995 triggering offenses that involved the fight with security guards.

In addition to summarizing defendant's criminal history, the People argued defendant had behaved poorly while in prison. The People asserted defendant's California Department of Corrections and Rehabilitation (CDCR) classification score[5] was then 103 and his prison housing level was "IV, the highest and

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[5] A CDCR Classification score helps determine inmate placement, including the security level of the facility where a defendant will be sent to serve his or her sentence. The score accounts for factors such as age at first arrest, age at CDCR reception, current term of incarceration, gang membership, prior incarcerations, and seriousness of the current conviction. (See Cal. Code Regs., tit. 15, § 3375.1.) Prisoners with a placement score of 60 and above are placed in a Level IV facility. (Cal. Code Regs., tit. 15, §§ 3375.1, subd. (a)(4), 3377, subd. (d).)

most restrictive status." The People argued defendant exhibited "violent and antisocial behavior" while in custody, including serious rules violations for "battery on a peace officer (four times), battery on an inmate, threatening a peace officer, mutual combat (twice), behavior which could lead to violence, possession of contraband, delaying peace officers (three times) and disobeying orders (six times)."

The evidence submitted by the People in connection with their opposition to the Proposition 47 petition provided additional detail concerning several of the more notable Rule Violation Reports (RVRs) defendant had amassed:

> – A June 2012 RVR for fighting resulting in the use of force, in which defendant and another inmate were observed punching one another in the face and upper torso, even after all inmates were ordered to the ground; officers deployed a chemical agent to stop them from fighting;
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> – Assault on a Peace Officer Not Likely to Cause Serious Bodily Injury, on February 22, 2011, for swinging clenched fists toward one of two officers who attempted to handcuff defendant for refusing to submit to an unclothed body search, and then resisting the officers' attempts to force him to the ground until they subdued him with pepper spray;
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> – Aggravated Battery on a Peace Officer and Battery on a Peace Officer Not Involving Use of Force, on January 26, 2007, for yelling to jail personnel from his cell ("Feed me, you mother fuckers" and "Fuck you bitch, you punk ass Mexican, feed me"); inciting other inmates to yell; spitting in

an officer's eye; kicking two officers; and directing other profanities at the officers;

– Threatening a Peace Officer, on July 17, 2006, for stating, "You need to be careful on the tier, because you are going to get hurt"; when the officer asked if he was being threatened, defendant stated, "You need to be careful on the tier and watch your back . . . .";

– Mutual Combat, on December 6, 2005, for continuously punching another inmate until officers deployed a blast grenade;

– Battery on Staff, on April 3, 2002, for punching an officer twice in the face and having to be forcibly handcuffed after another officer deployed pepper spray; and

– Battery on an Inmate, on September 21, 1995, for hitting another inmate in the side of the face, which caused the inmate to fall, and for throwing an unidentified white chalky substance on the inmate which caused a "burning sensation on [the inmate's] scalp consistent with a chemical burn."[6]

As to defendant's record of rehabilitation, the People maintained defendant had made "little progress." The People acknowledged defendant had "periodically worked and attended

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[6] The People's opposition also noted defendant had been placed in the prison's segregation unit for fighting with other inmates in November 2014 but did not receive an RVR for incident because he was found to have been the victim of a battery.

school during [ ]his incarceration period," but faulted him for failing to take advantage of substance abuse programming in light of his history of using alcohol and cocaine. The People further noted defendant had not participated in anger management programming in spite of "his history of aggression," and the People argued there was no evidence defendant had "overcome his anti-authoritarian ways" or obtained sufficient vocational skills in prison.

Defendant and the People submitted documentary exhibits in advance of a scheduled hearing on defendant's Proposition 47 petition. The defense submitted several of the RVRs documenting defendant's prison conduct violations, believing that in several instances the reports disclosed mitigating circumstances (e.g., that the April 2002 battery on a peace officer violation occurred while defendant was on psychiatric medication and did not remember what happened). Also among the exhibits defendant designated were therapist progress notes from prison recreational therapy sessions between August 2009 and March 2010, as well as a March 2014 letter from the Amity Foundation stating defendant had been accepted into its residential program to help him "successful[ly] transition back into the larger community."

C. The Trial Court's Ruling

At the January 19, 2016, hearing on defendant's Proposition 47 petition, the trial court received the proffered exhibits into evidence and heard argument from counsel.

The People urged the court to deny the petition in light of "the combination of his history of robberies and the nature of this [1995] . . . violently committed [section] 459 commercial burglary,

which was similar conduct to several of his prior convictions[;] [defendant's] failure to program[;] and his violence against the correctional officers . . . ." The People believed that "even under . . . the more difficult standard under Prop 47, . . . he's currently a danger to the community under that standard."

Defendant's attorney addressed his client's behavior in prison, stating defendant had "certainly made some mistakes, but . . . tried to correct those that he could have." The trial court stated it understood "that sometimes when guys first go to prison, they have to get in a few fights to show they can't be picked on," but the court stated defendant's pattern of fights and "getting into it with correctional officers" gave it pause. Defense counsel conceded the correctional officer assault violations were serious but asked the court to consider defendant's history "in its totality." Defense counsel maintained defendant did not have "a history really of violence," and argued defendant's record and characteristics did not meet the Proposition 47 standard of dangerousness: "[U]nder Prop 47, the court has to be convinced that he will commit a super strike not just defensive [*sic*] now. We know 47 takes it to another level, and [the People] have the burden. And I think all they have shown is he's been in trouble. But that's not the test for Prop 47."

The trial court took the matter under submission and later issued a 19-page memorandum of decision finding defendant unsuitable for a Proposition 47 recall of sentence because he posed an unreasonable risk of danger to public safety.

The court's decision recognized Proposition 47 required assessing whether defendant posed the requisite danger only on the basis of whether there was an unreasonable risk he would commit a super strike offense described in section 667,

subdivision (e)(2)(C)(iv). As the court correctly cataloged, "[t]he enumerated super strikes include: a sexually violent offense . . . ; oral copulation with a child under 14 years of age . . . ; any homicide or attempted homicide offense . . . ; solicitation to commit murder . . . ; assault with a machine gun on a peace officer or firefighter . . . ; possession of a weapon of mass destruction . . . ; and, notably, any serious or violent felony offense punishable by death or life imprisonment."[7] (Italics omitted.)

The trial court's analysis under this standard of dangerousness did not identify a specific enumerated offense (or offenses) that it believed defendant posed an unreasonable risk of committing. Rather, the court rested its ruling on a summary of the evidence before it and a general conclusion that the People had carried their burden to prove defendant was an unreasonable risk of danger to public safety. More specifically, the court summarized the evidence presented in light of the section 1170.18, subdivision (b) factors that govern discretionary dangerousness determinations, namely, the defendant's criminal history, his disciplinary and rehabilitation record while incarcerated, and any other evidence the court deemed relevant.

The trial court characterized defendant's criminal history as "extensive," noting it began in 1979. The court also conceded, however, that defendant's criminal past "may be remote in time." (Defendant's most recent criminal convictions were the two 1995

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[7] In a footnote, the trial court listed a number of "unlisted" super strike crimes (i.e., crimes not specified in section 667, subdivision (e)(2)(C)(iv) but carrying a maximum penalty of death or life in prison)—including aggravated mayhem and torture.

burglary crimes that triggered his Three Strikes sentence—committed over twenty years before the Proposition 47 hearing.) But the court believed, analogizing to cases involving the review of parole determinations, that defendant's criminal history remained a relevant concern because "his disciplinary history, elevated classification score, lack of rehabilitative programming, and insufficient parole [*sic*] plans" meant there continued to be a nexus between his criminal history and his current risk of danger to public safety.

Regarding defendant's disciplinary history, the trial court believed defendant had engaged in "significant institutional misconduct" in prison. The court summarized its view of defendant's disciplinary record as follows: "[Defendant] has incurred 18 RVRs while in prison, including six for violent conduct, one for behavior which could lead to violence, and one for threatening a peace officer. . . . In particular, [defendant] received an RVR for fighting resulting in the use of force as recently as 2012[,] as well as four RVRs for assaulting peace officers in 2011, 2007,[ ] and 2002. Further, [defendant] has received numerous RVRs for disobeying orders and refusing to accept housing assignments, indicating a lack of respect for authority and failure to comply [with] the rules and regulations of the CDCR."[8] In the court's view, "[defendant's] disciplinary history reflect[ed] a pattern of violent and aggressive conduct,

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[8] The court also relied on defendant's then-most-recent prison classification score, which in the court's view, "reflects that [defendant] has engaged in serious misconduct for a consistent amount of time, as his score has steadily increased from an initial classification score of 59 or 79."

evidencing his inability or unwillingness to comply with rules, respect authority, and refrain from fighting."

The trial court further noted defendant had engaged little prison programming that might ameliorate the risk it perceived in defendant's criminal and disciplinary history. The court was not persuaded that defendant's participation in recreational therapy from August 2009 through March 2010—when viewed in context of his nearly 21-year period of incarceration—was significant evidence of rehabilitation. The court found it significant that defendant had not engaged in anger management programming "despite his disciplinary history and pattern of aggressive and violent conduct" nor substance abuse programming despite drug use revealed by his criminal history. The court further found (1) there was no evidence defendant had "developed any professional or vocational skills in his nearly 21 years of incarceration,[ ] making it unclear how [defendant] is prepared to support himself once released," and (2) his "post-release plans [were] tenuous at best."[9]

On the other side of the equation, the trial court did take into account defendant's "advanced age of 56" and his low California Static Risk Assessment (CSRA) score, which the court acknowledged would typically be factors indicating defendant no longer posed a risk of danger to society because "studies show

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[9] The court explained that the March 2014 letter defendant provided from the Amity Foundation had not been updated and did not describe the program's length. The court viewed defendant's plans for where he would go following the Amity Foundation program to be unspecified beyond a general claim of family support.

criminality declines drastically after age 40 and even more so after age 50." But the court again relied on defendant's prison disciplinary record, which "show[ed] [defendant] getting into fights and assaulting others well into his forties and fifties," plus the other evidence it summarized, to conclude defendant was nevertheless "likely to commit a 'super strike.'"

II. DISCUSSION

Although the trial court did not specify the super strike crime (or crimes) it believed defendant posed an unreasonable risk of committing, the Attorney General, to his credit, attempts to fill the analytical gap in arguing for affirmance. He posits the trial court was within its discretion to conclude defendant posed an unreasonable risk of committing (1) aggravated mayhem or torture, based on the 1995 incident when defendant threw an unidentified substance on another prison inmate that cause a burning sensation and an otherwise "violent pattern of conduct"; or (2) murder or attempted murder, based on defendant's "ongoing history of fighting in prison."

We are not convinced and hold, instead, that defendant's Proposition 47 petition should have been granted. There is no question defendant had a history of getting into fistfights, which is in large part why we affirmed the denial of his Proposition 36 petition that is governed by a more permissive standard of dangerousness. But the Proposition 47 dangerousness standard is substantially more demanding, and the People's evidence was not up to the task. The record indicates defendant had not been previously convicted of (or charged with) committing a super strike crime; his criminal history and prison rules violations included no instance where he either used a deadly or dangerous

weapon, or his violent acts actually caused, or were likely to cause, great bodily injury or death; and there was no evidence to suggest defendant had made any threats (credible or otherwise) to commit a super strike crime. Under the circumstances, it exceeds the bounds of reason to conclude he poses an unreasonable risk of committing murder, aggravated mayhem (§ 205 [intentionally causing, with extreme indifference to another's well-being, permanent disfigurement or disability]), or torture (§ 206 [infliction of great bodily injury with intent to cause cruel or extreme pain and suffering]).

A. Standard of Review

We review the denial of a Proposition 47 petition on the ground of future dangerousness under the abuse of discretion standard because section 1170.18, subdivision (b) by its terms, confers discretion on trial courts to deny petitions for that reason. (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1263-1264 (*Hall*); *People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243 (*Jefferson*).) A trial court abuses its discretion when the "ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162; see also *Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 537 [abuse of discretion review is deferential but not empty]; *Otay Land Company, LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 863 [""The abuse of discretion standard . . . measures whether . . . the act of the lower tribunal falls within the permissible range of options set by the legal criteria"].)

B. Defendant's Proposition 47 Petition Should Have Been Granted

Proposition 47 "reduced certain drug-related and theft-related offenses that previously were felonies or 'wobblers' to misdemeanors. [Citation.] It also enacted a procedure permitting inmates who are serving felony sentences for offenses that Proposition 47 reduced to misdemeanors to petition to have their felony convictions reclassified as misdemeanors and to be resentenced based on the reclassification." (*Valencia*, *supra*, 3 Cal.5th at p. 351, fn. omitted.) "Proposition 47 gave resentencing courts discretion to decline to impose a lesser sentence if resentencing 'would result in an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b)(3).)" (*Ibid.*)

Proposition 47, however, "limits the trial court's discretion to deny resentencing by defining the phrase 'unreasonable risk of danger to public safety' narrowly."[10] (*Valencia*, *supra*, 3 Cal.5th at p. 355.) An "unreasonable risk of danger to public safety" means an unreasonable risk that a defendant will commit a new

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[10] The statutory limits Proposition 47 places on a court's discretion are further underscored by the ballot arguments presented to the voters who approved the measure. The opponents of Proposition 47 argued it would '"prevent[ ] judges from blocking the early release of prisoners [only] in very rare cases. For example, even if the judge finds that the inmate poses a risk of committing crimes like kidnapping, robbery, assault, spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang, Proposition 47 requires their release.' (Voter Information Guide[, Gen. Elec. (Nov. 4, 2014),] argument against Prop. 47, p. 39.)" (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310-1311 (*Hoffman*).)

super strike crime within the meaning of section 667, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) "The felonies commonly referred to as super strikes are (1) a "'[s]exually violent offense,'" as defined in Welfare & Institutions Code, section 6600, subdivision (b); (2) oral copulation or sodomy, or sexual penetration of a child under 14 years of age and more than 10 years younger than the defendant, as defined in Penal Code sections 286, 288a and 289; (3) a lewd or lascivious act involving a child under 14 years of age, in violation of section 288; (4) any homicide offense, including attempted homicide, as defined in sections 187 to 191.5; (5) solicitation to commit murder, as defined in section 653f; (6) assault with a machine gun on a peace officer or firefighter, as defined in section 245, subdivision (d)(3); (7) possession of a weapon of mass destruction, as defined in section 11418, subdivision (a)(1); and (8) any serious and/or violent felony offense punishable in California by life imprisonment or death. (See § 667, subd. (e)(2)(C)(iv)(I–VIII).)"[11] (*Valencia*, *supra*, 3 Cal.5th at p. 351, fn. 3.)

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[11] The trial court listed offenses that would satisfy this final category, i.e., offenses punishable by life in prison or death. Among the former are gross vehicular manslaughter with a prior (§ 191.59d)), aggravated mayhem (§ 205), torture (§ 206.1), aggravated kidnapping (§§ 209 and 209.5), attempted train wrecking (§ 218), train wrecking not resulting in death (§ 219), aggravated assault during commission of a residential burglary (§ 220, subd. (b)), human trafficking (§ 236.1, subd. (c)(2)), aggravated sexual assault of a child under 14 (§ 269), aggravated assault on a child under 8 resulting in death (§ 273ab), arson with intent to cause injury (§ 451.5, subd. (b)), various sex offenses (§ 667.61, subd. (c)), exploding a destructive device with intent to commit murder (§ 18745), malicious explosion of a

The prosecution bears the burden of proving there is an unreasonable risk that a defendant will commit a super strike crime. (*Jefferson*, *supra*, 1 Cal.App.5th at pp. 241-242.) In determining whether the prosecution has satisfied its burden, section 1170.18 directs resentencing courts to specifically consider "(1) [defendant]'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) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence' the court deems relevant. (§ 1170.18, subd. (b)(1)-(3).)" (*Valencia*, *supra*, 3 Cal.5th at p. 355.) "'The critical inquiry . . . is not whether the risk is quantifiable, but rather, whether the risk would be "unreasonable."' (*People v. Garcia* (2014) 230 Cal.App.4th 763, 769[ ].)" (*Hall*, *supra*, 247 Cal.App.4th at p. 1262.)

The record provides no adequate basis to conclude the People proved defendant poses an unreasonable risk of committing murder (whether completed or attempted), aggravated mayhem, or torture. Considering his criminal history, these super strike offenses appear to be entirely out of character. Defendant has a long "rap sheet," but the offenses are

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destructive device causing great bodily injury, mayhem, or death (§ 18755), and sabotage causing great bodily injury (Mil. & Vet. Code, § 1672). Among the latter are treason (§ 37), procuring the execution of an innocent person by perjury (§ 128), train wrecking resulting in death (§ 219), assault with a deadly weapon, or by means of force likely to produce great bodily injury, by a life prisoner acting with malice aforethought (§ 4500), and sabotage causing death (Mil. & Vet. Code, § 1672).

almost all property and drug use crimes—the single instance of violence apparent from the record is associated with his 1995 struggle with security guards in which one of the guards grabbed defendant as he was attempting to flee with burgled proceeds and defendant responded by punching the security guards in a fight that lasted one minute.

Defendant's disciplinary history in prison is, of course, greater cause for Proposition 47 concern. In a prison environment (as distinguished from his criminal conduct when not in custody), defendant more frequently engaged in violent behavior. The last such incident occurred in 2012, four years before the Proposition 47 hearing, and there were several other fistfights—some involving prison guards—separated by intervals as short as one year and as long as seven years. The trial court recognized that for "a guy who['s] been in for 20 years" it is "not the end of the world" to get in "a few fights" during the first few years of incarceration, but the court was appropriately troubled that defendant continued to get involved in altercations even later during his time in prison. Critically for purposes of Proposition 47, however, the circumstances of defendant's rules violations bear insufficient indicia that would permit the inferential leap from fist-fighting to a proclivity to commit murder, aggravated mayhem, or torture.[12]

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[12] We respectfully disagree with the Attorney General's suggestion that the rule violation involving the unidentified "white chalky substance" substance thrown on a victim inmate's scalp is probative of a risk he would commit torture or aggravated mayhem. The RVR summarizing the incident states only that the substance "was causing [the inmate] a burning sensation on [his] scalp consistent with a chemical burn," not that

On the record before us, there is no question defendant poses an unreasonable risk of committing further crimes, including assault and resisting an executive officer. In that sense, he does pose a generalized danger to public safety. But assault and resisting an executive officer are not super strikes. Defendant has no prior super strike convictions; he has no history (in prison or out) of using deadly or dangerous weapons; he has not (so far as the record reveals) made threats to commit a super strike crime or a crime substantially more serious than those he has committed; he has not inflicted great bodily injury (again, so far as the record reveals); and he has not demonstrated a pattern of violence progressively increasing in severity that, combined with evidence of an inability to control violent impulses, might permit a conclusion that commission of a super strike crime is just a matter of time. We hasten to add that none of the factors we have just listed are indispensable, individually, to make a Proposition 47 dangerousness finding (see *Hall*, *supra*, 247

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the substance was so caustic that it actually caused a chemical burn. The burning sensation described in the RVR is simply too dissimilar to the major disfigurement and infliction of extreme pain that are hallmarks of mayhem and torture. (§§ 205 ["A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body"]; 206 ["Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture"].)

Cal.App.4th at p. 1266), but their absence in the aggregate here is dispositive. Section 1170.18, subdivision (c)'s dangerousness standard contemplates that some limited category of defendants who have engaged in violence will nonetheless warrant resentencing, and there is nothing in the record that permits a reasonable conclusion that defendant falls outside that category. (See *Hoffman*, *supra*, 241 Cal.App.4th at p. 1311 ["[T]he electorate weighed the costs and benefits of [Proposition 47] and the resulting Act is unambiguous"].)

Indeed, the facts in this case are properly distinguished from other Court of Appeal cases that have affirmed a trial court's Proposition 47 dangerousness finding. In *Hall*, *supra*, 247 Cal.App.4th 1255, the Court of Appeal held that the trial court "could reasonably infer from [the defendant]'s recent criminal behavior and repeated failure to rehabilitate that he present[ed] an elevated—and escalating—risk of not only threatening violence, but also using deadly force. (See § 667, subd. (e)(2)(C)(iv)(IV).)" (*Id.* at p. 1266.) The trial judge in that case had remarked that in the defendant's most recent crimes, he "'[expressed] a willingness to not only use force but to use deadly force. In [an earlier] case, [he] is alleged to have told the victim, quote, "Stop following me or I'm going to kill you." In the most recent case, [he] did use a knife and did indicate to [the victim] that . . . if she didn't let go of her purse, he would stab her." (*Id.* at pp. 1264-1265.) Under these circumstances, the *Hall* court held the trial judge appropriately concluded that it had "'circumstantial evidence of an individual who has the present capacity, and presumably the willingness to use deadly force. [¶] And if I . . . look at how contemporaneous those incidents are in time to the request being made today, . . . [¶] . . . I think . . . *a*

reasonable inference can be drawn that [*defendant*] *is in fact ready, willing, and able to commit one of those super strikes* if . . . one of his victims doesn't comply with his unreasonable and unlawful demands.' (Italics added.)" (*Id.* at pp. 1264-1265.)

Likewise, in *Jefferson*, the Court of Appeal relied on the defendant's commission of an egregiously violent robbery—involving the defendant's personal use of a firearm and his personal infliction of great bodily injury on the victim—plus the defendant's gang ties to hold the defendant "was likely to commit a super strike, namely murder, attempted murder, or solicitation to commit murder, if resentenced on his 2014 commercial burglary conviction under Proposition 47." (*Jefferson*, *supra*, 1 Cal.App.5th at p. 245.) The Court of Appeal quoted the trial court's observation that the defendant's prior robbery was "'as robberies go' . . . 'one of the worst ones.'" (*Id.* at p. 245; see also *id.* at p. 243 [recounting the facts of the armed home invasion robbery in which the defendant and three other masked men repeatedly struck the victim on the head and dragged her around an apartment by her hair; she was rendered unconscious at one point and ultimately required 13 stitches to close her wounds].) The defendant's commission of that armed robbery, his participation in gang "melees" in prison, his authorship of prison gang messages indicating his loyalty to the Blood gang, and his threats and assaults on correction officers convinced the Court of Appeal that the trial judge did not abuse his discretion in concluding Proposition 47's heightened standard of dangerousness was satisfied. (*Id.* at pp. 244-245.)

The facts of this case stand in significant contrast to the facts of *Hall* and *Jefferson*. Unlike those cases, defendant's Proposition 47 petition should have been granted because it

cannot be reasonably inferred from the evidence that defendant poses an unreasonable risk of committing a "super strike" if resentenced.

DISPOSITION

The order denying defendant's section 1170.18 petition is reversed, and the matter is remanded to the trial court with directions to grant the petition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

I concur:

RAPHAEL, 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.

KRIEGLER, Acting P.J., dissenting
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I respectfully dissent. In my view, the majority does not afford the trial court's findings the deference required by the abuse of discretion standard of review.

Under Proposition 47, an inmate who otherwise qualifies for reduction of a felony to a misdemeanor may be denied relief if he poses an unreasonable risk to public safety. Proposition 47 has a narrow definition of unreasonable risk of danger to public safety—it means an unreasonable risk that the inmate will commit a new violent felony (a "super strike") within the meaning of Penal Code section 667, subdivision (e)(2)(C)(iv).[1] "'The critical inquiry . . . is not whether the risk is quantifiable, but rather, whether the risk would be "unreasonable."' (*People v. Garcia* (2014) 230 Cal.App.4th 763, 769.)" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1262 (*Hall*).) We review the trial court's decision for abuse of discretion. (*Id.* at pp. 1263–1264.)

The facts are thoughtfully set forth in detail by the majority. Those facts conclusively show that defendant is a habitually violent person, and the majority understandably does not conclude otherwise. Defendant has displayed his tendency to commit violence on multiple occasions outside of prison. His violence has not abated in prison, and if anything, it has increased. Typically an inmate's classification score decreases

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[1] Statutory references are to the Penal Code.

with age; defendant's scores have skyrocketed to the point he requires the highest level of incarceration. Defendant is not selective in his use of violence—he attacked victims and security officers in several of his felony convictions, he has battered inmates to the point that tear gas was employed to stop his assaults, he threw a caustic substance at one of his assault victims causing burns, and he has committed multiple acts of physical violence upon correctional officers.

The trial court did not abuse its discretion in denying defendant's Proposition 47 petition. There is substantial evidence to support a finding that defendant poses an unreasonable danger that he will commit a disqualifying offense such as murder,[2] attempted murder, or aggravated mayhem. The

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[2] "This state has long recognized 'that an assault with the fist . . . may be made in such a manner and under such circumstances as to make the killing murder.' (*People v. Munn* (1884) 65 Cal. 211, 212.)" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) And even an accidental death during the commission of a robbery or burglary—defendant's crimes of choice—is first degree murder. (§ 189 ["All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . robbery [or] burglary . . . is murder of the first degree"]; *People v. Dominguez* (2006) 39 Cal.4th 1141, 1159 ["'The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing . . . whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony'"].) Considering defendant's propensity to commit robbery and burglary, and his repeated instances of punching others in the head, the trial court could, in its discretion, find that defendant poses an unreasonable danger of committing murder.

fact that defendant had not previously committed a disqualifying "super strike" offense is not determinative. (*Hall*, *supra*, 247 Cal.App.4th at p. 1266.) Defendant has shown a willingness to resort to violence both in and out of prison. Defendant has made no real progress toward rehabilitation.

My colleagues accurately note, in footnote 10, that the opponents of Proposition 47 warned of the potential for release of violent offenders, but the voters passed the initiative despite the warnings. But assurances were made by the proponents of Proposition 47 that the initiative "includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) p. 39.) According to the proponents, Proposition 47 "is sensible," it would "[i]mprove public safety," and the initiative "*Keeps Dangerous Criminals Locked Up*." (*Ibid.*, emphasis in original.) My colleagues, quite correctly, do not suggest that there is a reasonable likelihood, or any likelihood, that defendant will suddenly turn non-violent if released under Proposition 47. By any objective standard, release of defendant is inconsistent with the promises of the proponents of Proposition 47. Defendant's repetitive violence, in and out of custody, places him among "the most dangerous criminals," and the trial court did not abuse its discretion in denying relief under Proposition 47.

KRIEGLER, Acting P.J.