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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. LEE WILLIAM BERG, Defendant and Appellant.	B264001 (Los Angeles County Super. Ct. No. LA0196703)

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

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Lee William Berg is currently serving a "Three Strikes" sentence of 25 years to life for burglary. Following the passage of the Three Strikes Reform Act (Proposition 36), he petitioned for resentencing under Penal Code section 1170.126[1]. The trial court found that petitioner was eligible for resentencing based on current and past offenses, but denied the petition on the ground that resentencing him would "pose[] an unreasonable risk of danger to public safety."

After the trial court denied the petition, the voters adopted the Safe Neighborhoods and Schools Act (Proposition 47 or section 1170.18). Petitioner now argues on appeal that Proposition 47's definition of "unreasonable risk of danger to public safety" applies to dangerousness determinations under Proposition 36. In the alternative, he contends that Proposition 36's definition of "unreasonable risk of danger to public safety" is unconstitutionally vague and, under any definition of that term, he did not pose such a risk. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, petitioner entered a grocery store and concealed three bottles of liquor underneath his jacket. After he left without paying for the liquor, employees confronted him in the parking lot. Petitioner began "fighting" with the employees and was taken into custody by force. No employees were injured. Petitioner was under the influence of heroin at the time of the offense.

Petitioner was convicted of second degree burglary (§ 459) and petty theft with a prior (§ 666). The trial court found that petitioner suffered two prior felony convictions for burglary and attempted burglary within the meaning of the Three Strikes Law (§§ 667 and 1170.12). The trial court imposed a third strike term of 25 years to life for the burglary count, and stayed punishment for the petty theft conviction pursuant to section 654.

In March 2013, petitioner filed a petition for resentencing under Proposition 36. In October 2013, the People opposed the petition, arguing that resentencing petitioner

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

would pose an unreasonable risk of danger to public safety based on his extensive criminal history and "violent and disruptive behavior" in prison. In February 2014, petitioner filed a response arguing that he had not been convicted of any violent crimes, his conduct in prison was "good," and he had been accepted into a residential program that would assist him with "re-entry to society."

On September 15, 2014, the court held a hearing and heard evidence and argument regarding the petition. The People submitted evidence of petitioner's criminal history and disciplinary record while incarcerated. Petitioner's felony convictions prior to his current incarceration consisted of thefts and burglaries. In 2009, while incarcerated, he was convicted of possession or manufacture of a weapon (§ 4502, subd. (a)).

During petitioner's current incarceration of 19 years, he has been found guilty of 14 serious rules violations ("CDC 115's"),[2] including the following. In 1996, he received a CDC 115 for striking his cellmate "with his fists." In 1999, he received a CDC 115 for participating in a fight involving multiple inmates. In 2000, he was issued a CDC 115 for fighting with another inmate. In 2007, he was found guilty of participating in a fight involving multiple inmates and being in possession of a sharpened, metal weapon. And, in 2009, he received a CDC 115 for battery on an inmate with a weapon. The inmate attacked was treated for injuries "consistent with stab wounds." This violation resulted in petitioner's conviction of possession or manufacture of a weapon (§ 4502, subd. (a)) and an additional six-year term.

The defense submitted evidence that petitioner had received satisfactory and above average grades from his work supervisor at the prison laundry, participated in Narcotics Anonymous classes, and was accepted into a "live in program" that would provide room, board and "life skills training" upon his release from prison. The defense also presented expert testimony by Richard Subia, a prison practices expert, and Dr. Hy Malinek, a clinical and forensic psychologist.

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[2] "According to the California Code of Regulations, a CDC 115 documents misconduct believed to be a violation of law which is not minor in nature." (*In re Gray* (2007) 151 Cal.App.4th 379, 389; see also Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

Subia opined that petitioner was unlikely to pose an unreasonable risk of danger to public safety if released. He noted that petitioner's criminal history "in the community" did not involve any violent offenses but only "drug and property related offenses . . . consistent with those of a drug addict." Subia interviewed petitioner, who explained that his prison rule violations for possession of a weapon and battery on an inmate with a weapon were the result of his being threatened by other "influential" inmates who asked him to commit these actions. Subia believed petitioner's explanations were "consistent with what would normally occur in the prison environment when a drug addict of small stature . . . enters a prison setting." However, Subia noted that petitioner "always had the option of seeking out the assistance and protection of prison authorities."

Dr. Malinek provided evidence that based on testing using several actuarial measures, petitioner's risk of engaging in violence was moderate to high. However, Dr. Malinek opined that the overall risk that petitioner would commit an act of violence outside of prison was only low to moderate in light of petitioner's age of 55 years and studies showing that age is negatively correlated with recidivism. He concluded that petitioner did not pose an unreasonable risk of danger to public safety.

On October 31, 2014, the trial court denied the petition after finding that resentencing petitioner would pose an unreasonable risk of danger to public safety. In support of this finding, the court noted that petitioner's disciplinary record in prison showed he had committed violence against other prisoners, and "[his] scores on a variety of actuarial measures designate the violence risk in a range of recidivism between moderate to high." Petitioner appealed.

CONTENTIONS

Petitioner contends that (1) Proposition 47's definition of an "unreasonable risk of danger to public safety" applies to dangerousness determinations under Proposition 36, (2) Proposition 47's definition of "unreasonable risk of danger to public safety" applies retroactively to his petition, (3) Proposition 36's "unreasonable risk of danger to public safety" standard is unconstitutionally vague, and (4) under any standard, petitioner did not pose an unreasonable risk of danger to public safety.

DISCUSSION

1. *Statutory Interpretation*

The issues raised by petitioner require us to interpret Proposition 36 and Proposition 47. " 'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) When the language is not ambiguous, the plain meaning of the statutory language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1992) 21 Cal.4th 226, 231.) Furthermore, although courts may not generally rewrite a statute's unambiguous language, a word that has been erroneously used may be subject to judicial correction in order to best carry out the intent of the adopting body. (*People v. Skinner* (1985) 39 Cal.3d 765, 775.)

2. *Proposition 36*

"Prior to its amendment by [Proposition 36], the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. (Former §§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) [Proposition 36] amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction

for a serious or violent felony. [Citations.]" (*People v. Johnson* (2015) 61 Cal.4th 674, 680–681.)

"[Proposition 36] also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

In determining whether the petitioner would pose an unreasonable risk of danger to public safety, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Proposition 36 became effective on November 7, 2012. (See *People v. Brown* (2014) 230 Cal.App.4th 1502, 1507.) Under section 1170.126, a petition for resentencing must be filed within two years of Proposition 36's enactment "or at a later date upon a showing of good cause . . . ." (§ 1170.126, subd. (b).)

3. *Proposition 47*

Proposition 47 was passed by California voters on November 4, 2014, effective November 5, 2014. (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The stated "[p]urpose and [i]ntent" of Proposition 47 include, among other things, "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthoriz[ing] consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors"; and "[r]equir[ing] a thorough review of criminal history and risk

assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), (4) & (5), p. 70.)

Proposition 47 created a new resentencing provision, section 1170.18, under which "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence" and request resentencing. (§ 1170.18, subd. (a).)

"If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner 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. 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." (§ 1170.18, subd. (b).)

In contrast to Proposition 36, which does not define the term "unreasonable risk of danger to public safety," Proposition 47 provides that "[a]s used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [section 667, subd. (e)(2)(C)(iv)]." (§ 1170.18, subd. (c).) Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, sometimes called "super strike" offenses: "(I) A 'sexually violent offense' . . . . [¶] (II) Oral copulation . . . as defined by Section 288a, sodomy . . . as defined by Section 286, or sexual penetration . . . as defined by Section 289. [¶] (III) A lewd or lascivious act . . . in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense . . . . [¶] (V) Solicitation to commit murder

. . . . [¶] (VI) Assault with a machine gun on a peace officer or firefighter. . . . [¶] (VII) Possession of a weapon of mass destruction. . . . [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

4. *Proposition 47's Definition of an "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Proposition 36*

Proposition 36's resentencing provision, section 1170.126, gave petitioners "two years" from its enactment on November 7, 2012, to file a petition for resentencing "or at a later date upon a showing of good cause . . . ." (§ 1170.126, subd. (b).) Here, the trial court denied the petition for resentencing one week before the closing of that two-year window. Two days before the window closed, Proposition 47 went into effect.

Petitioner contends that Proposition 47's narrow definition of "unreasonable risk of danger to public safety" controls the meaning of that term as used in Proposition 36. Specifically, petitioner notes that Proposition 47 says, "[*a*]*s used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony." (§ 1170.18, subd. (c), italics added.) Petitioner argues that by using the phrase "[a]s used throughout *this Code*," Proposition 47 imports its definition of "unreasonable risk of danger to public safety" into the entire Penal Code, including, as relevant here, into section 1170.126, subdivision (f).

Many appellate courts have considered whether Proposition 47's definition of "unreasonable risk of danger to public safety" applies to resentencing under Proposition 36, and the issue currently is pending before the California Supreme Court. (See, e.g., *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825; *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted February 18, 2015, S223676; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168; *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Garcia* (2016) 244 Cal.App.4th 224, review granted April 13, 2016, S232679; *People v. Lopez* (2015) 236 Cal.App.4th 518, review granted July 15, 2015, S227028.) We conclude, consistent with the majority of courts to have considered

this issue, that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

" 'We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. [Citation.] . . . Whether the use of [a particular word] is, in fact, a drafting error can only be determined by reference to the purpose of the section and the intent of the electorate in adopting it." (*People v. Skinner*, *supra*, 39 Cal.3d at pp. 775–776.)

For the reasons that follow, we conclude that the voters erroneously used the word "Code" in section 1170.18, subdivision (c), rather than the word "Act," and that this error is properly subjected to judicial correction. Specifically, as we now discuss, we believe the voters intended in section 1170.18, subdivision (c) to refer to Proposition 47, not to the entire Penal Code. We therefore conclude that the passage of Proposition 47 did not alter Proposition 36 or section 1170.126.

First, Proposition 47's ballot materials and statutory language do not indicate that the definition of "unreasonable risk of danger to public safety" would extend beyond Proposition 47 itself. To the contrary, subdivision (n) states, "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments *in any case not falling within the purview of this act*." (§ 1170.18, subd. (n), italics added.) If a court ruling on a Proposition 36 petition must grant the petition unless it finds an unreasonable risk the petitioner will commit a "super strike" under the restrictive definition provided by section 1170.18, subdivision (c), the finality of the underlying judgment may be "diminish[ed]" even though the case does not "fall[] within the purview of [Proposition 47]." (*Id.*, § 1170.18, sub. (n).)

Likewise, the official title and summary, legal analysis, and arguments for and against Proposition 47 nowhere suggest that Proposition 47 will have an impact on Proposition 36. (Voter Information Guide, *supra*, pp. 34-39.) The ballot materials do

not, for example, say that Proposition 47 will severely restrict the ability of courts to reject resentencing petitions under Proposition 36. Rather, the ballot materials emphasize that the resentencing provisions of Proposition 47 will affect only those persons serving sentences for specified nonserious, nonviolent property or drug crimes. Accordingly, nothing in Proposition 47's ballot materials suggests that the initiative will affect resentencing under Proposition 36.

Furthermore, Propositions 36 and 47 have different purposes. Proposition 36 is designed to reduce penalties for individuals with two or more prior serious or violent felony convictions, whose current conviction is also a felony. By contrast, Proposition 47 is intended to reduce penalties for low-level offenders who have committed "certain nonserious and nonviolent property and drug offenses." (Voter Information Guide, *supra*, p. 35.)

The wording of section 1170.18, subdivision (c) is also inconsistent with an intent to apply that subdivision throughout the entire Penal Code. Subdivision (c) refers to the "petitioner," a term that is used throughout Proposition 47 to refer to persons petitioning under "this section" or "this act." (See § 1170.18, subds. (a), (b), (c), (j), (l), & (m).) Accordingly, subdivision (c)'s use of the term "petitioner" suggests that the term is limited to individuals petitioning under that particular act. (*Id.*, § 1170.18, sub. (c).)

Lastly, the timing of Proposition 47 is inconsistent with an intent to affect Proposition 36 petitions. Proposition 36 required defendants to file petitions within two years from its enactment absent a showing of good cause for a late petition. (§ 1170.126, subd. (b).) Proposition 47 was enacted with only two days remaining in the two-year period for filing Proposition 36 petitions. A rational voter would not have understood Proposition 47 to change the rules for Proposition 36 petitions when the period for filing such petitions had almost expired.

On these grounds, we conclude that section 1170.18, subdivision (c) contains a drafting error – the use of the word "Code" – that must be judicially corrected to read "Act." As so read, Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36.

5. *Proposition 47 Does Not Apply Retroactively to Petitioner's Petition*

Even were we to assume that Proposition 47's definition of "unreasonable risk of danger to public safety" applies prospectively to Proposition 36 petitions filed *after* Proposition 47 was enacted, we nonetheless would conclude it does not apply in this case because petitioner's Proposition 36 petition for resentencing was filed and decided *before* Proposition 47 went into effect.[3]

We agree with the majority of courts that have addressed this issue and conclude that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply retroactively. Section 3 of the Penal Code says, "No part of [the Penal Code] is retroactive, unless expressly so declared." The California Supreme Court "ha[s] described section 3, and its identical counterparts in other codes [citations], as codifying 'the time-honored principle . . . that *in the absence of an express retroactivity provision*, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*), italics added.)

Proposition 47 and the ballot materials are silent as to the initiative's retroactive application. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), pp. 34–39.) Thus, there is "no clear and unavoidable implication" of retroactivity that "arises from the relevant extrinsic sources." (*Brown, supra*, 54 Cal.4th at p. 320.)

Furthermore, the rule enunciated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), that statutes that are amended to reduce punishment for particular crimes are intended to apply retroactively, does not apply here. In *Estrada*, the California Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an

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[3] Whether Proposition 47 applies retroactively to proceedings under Proposition 36 is also currently pending before the California Supreme Court. (See *People v. Chaney*, *supra*, 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676.)

inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply . . . [including] acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.) Therefore, "where the amendatory statute mitigates punishment and there is no savings clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.)

Estrada does not apply in this case because applying the definition of "unreasonable risk of danger to public safety" in Proposition 47 to petitions for resentencing under Proposition 36 would not reduce punishment for a particular crime. (See *Brown, supra*, 54 Cal.4th at p. 325 [rejecting application of *Estrada* to statute where the statute "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent"].) Rather, it simply changes the lens through which the dangerousness determinations under Proposition 36 are made.

On these grounds, we hold that the definition of "unreasonable risk of danger to public safety" in Proposition 47 does not apply retroactively to a petitioner whose petition for resentencing under Proposition 36 was decided before the effective date of Proposition 47.

6. *Section 1170.126, Subdivision (g) Is Not Unconstitutionally Vague*

Subdivision (f) of section 1170.126 provides that the trial court must exercise its discretion to determine whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." Subdivision (g) of section 1170.126 provides that "[i]n exercising its discretion in subdivision (f), the court may consider:

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

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

"(3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Petitioner contends that if Proposition 47's definition of "unreasonable risk of danger to public safety" is not imported into Proposition 36, then Proposition 36 "violate[s] due process because [it] fail[s] to give notice of what is required for a finding of dangerousness and invite[s] arbitrary decisions." Specifically, petitioner argues that "there is no concrete way for a trial court to estimate a petitioner's *level of risk* . . . [¶] [or] *quantum of risk* that distinguishes a 'reasonable' risk from an 'unreasonable' risk." (Emphasis original.)[4]

Whether the term "unreasonable risk of danger to public safety" is unconstitutionally vague was addressed and decided in *People v. Garcia* (2014) 230 Cal.App.4th 763, which held that "the meaning of the term 'unreasonable risk of danger to public safety' [in section 1170.126] 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.) We agree with and adopt its holding and analysis.

As explained in *People v. Garcia*, " 'The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution [citation] and the California Constitution [citation].' [Citation.] 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient

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[4] Although petitioner challenges the categories of evidence set forth in subdivision (g) of section 1170.126 as unconstitutionally vague, his supporting argument is that the statute leaves uncertainty as to how to estimate an "unreasonable risk of danger to public safety." Accordingly, petitioner, in essence, argues that the term "unreasonable risk of danger to public safety" is unconstitutionally vague, and *not* that the categories of evidence provided in section 1170.126, subdivision (g)—a petitioner's criminal history, disciplinary record, and any other relevant evidence—are unclear.

reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.' [Citation.] [¶] . . . [¶]

"[With respect to section 1170.126's use of the term 'unreasonable risk of danger to public safety,'] the critical inquiry . . . is not whether the risk is quantifiable, but rather, whether the risk would be 'unreasonable.' (§ 1170.126, subd. (f).) ' "The law is replete with 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. Indeed, a wide spectrum of human activities is regulated by such terms: thus one man may be given a speeding ticket if he overestimates the 'reasonable or prudent' speed to drive his car in the circumstances [citation], while another may be incarcerated in state prison on a conviction of wilful homicide if he misjudges the 'reasonable' amount of force he may use in repelling an assault [citation]. As the Supreme Court stated in *Go-Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357, 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissively 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. 768–770.)

We agree with the *Garcia* court that the term "unreasonable risk of danger to public safety" as used in section 1170.126 is not unconstitutionally vague.

7. *The Trial Court Did Not Abuse Its Discretion in Denying the Petition*

Section 1170.126 provides that the trial court must exercise its discretion to determine whether a petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) "Where . . . 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.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

Petitioner argues that "[e]ven under the vague standard of Proposition 36, the trial court's denial constituted an abuse of discretion." Petitioner acknowledges that he was

found guilty of serious rule violations in prison for "acts of violence," but argues that he "was following the orders of powerful white inmates who threatened [his] personal safety if he failed to comply." He further contends that his expert witnesses, Subia and Dr. Malinek, both concluded that he did not pose an unreasonable risk of danger to public safety.

In 2007, petitioner was found guilty of being in possession of a sharpened weapon. In 2009, petitioner was found guilty of battery on an inmate with a weapon and convicted of possession or manufacture of a weapon (§ 4502, subd. (a)). The inmate who was attacked was treated for injuries "consistent with stab wounds." Although Subia testified that petitioner told him he was threatened by "influential" inmates who asked him to commit these actions and that Subia found this explanation believable, it was within the trial court's discretion to disbelieve petitioner's account of events. (See *People v. Trinh* (2014) 59 Cal.4th 216, 231 ["In deciding whether the trial court abused its discretion, . . . we are prohibited from reweighing the evidence; if credible evidence supports a trial court's findings, our review is at an end. [Citations.]"].) Even if the trial court believed that petitioner was influenced by powerful inmates who ordered him to commit these actions, Subia also testified that petitioner always had the option of seeking the protection of prison authorities.

Furthermore, although petitioner's experts, Subia and Dr. Malinek, opined that petitioner did not pose an unreasonable risk of danger to public safety, Dr. Malinek also provided evidence that petitioner's actuarial tests indicated that the risk he would engage in violence was moderate to high. Given petitioner's violent conduct in prison and expert evidence that there was a moderate to high risk he would engage in future acts of violence, the trial court did not abuse its discretion in concluding that he posed an unreasonable risk of danger to public safety within the meaning of Proposition 36.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.