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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. GLENN WRIGHT, Defendant and Appellant.	B277814 (Los Angeles County Super. Ct. No. VA022705)

APPEAL from a judgment 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.

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

In 1995, a jury convicted defendant Glenn Wright (defendant) on two counts of second degree burglary. 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. Appealing the trial court's ruling on his Proposition 36 petition in this case,[1] defendant's opening brief argued Proposition 47 enacted a more restrictive definition of "unreasonable risk of danger to public safety" that governed petitions filed under Proposition 36, and the trial court wrongly concluded defendant posed a danger under that heightened Proposition 47 standard. Defendant's reply brief concedes that argument is no longer viable after our Supreme Court's decision in *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*). The brief, however, asserts the trial court's denial of his Proposition 36 petition was error even under the more permissive dangerousness standard that applies in Proposition 36 cases; we shall consider the viability of that argument.

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[1] Defendant challenges the trial court's denial of his Proposition 47 petition in a separate pending appeal, case number B280669.

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's stores. In the second of these burglaries, defendant punched a security guard in the chest 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 36 Petition and the People's Opposition

In 2012, defendant petitioned to recall the Three Strikes sentence he received in the 1995 burglary case pursuant to

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

section 1170.126, a statute enacted in 2012 as part of the Three Strikes Reform Act (Proposition 36). Defendant argued the two burglary counts of conviction were statutorily eligible for resentencing.

The People opposed defendant's petition for resentencing. The People did not contest defendant's statutory eligibility for resentencing, but argued instead that the trial court should find defendant "unsuitable" for resentencing, i.e., that recalling defendant's sentence would pose an unreasonable risk of danger to public safety. The People's argument focused mainly on the facts of defendant's triggering offenses (the 1995 burglary convictions that triggered the Three Strikes sentence), defendant's criminal history, and defendant's rules violations while in prison.

As to defendant's criminal history, the People summarized his numerous 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 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 until he was apprehended.

In addition to summarizing defendant's criminal history, the People argued defendant had behaved poorly while in prison. The People asserted defendant had a California Department of Corrections and Rehabilitation (CDCR) Classification score of 119 in early February 2013, which was at least 40 points higher than his score was when he entered prison in 1995.[3] Defendant's most recent documented violent conduct—fighting resulting in the use of force—occurred in June 2012, after defendant was in his fifties. During that incident, defendant and another inmate were observed punching one another in the face and upper torso, and they continued striking each other even after all inmates were ordered to the ground. Officers had to deploy a chemical agent to

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[3] 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 (the highest level of security) facility. (Cal. Code Regs., tit. 15, §§ 3375.1, subd. (a)(4), 3377, subd. (d).) Defendant has been in a Level IV facility throughout his incarceration, except when he was placed in the Administrative Segregation Unit or the Segregation Housing Unit. By the time of the hearing on defendant's section 1170.126 petition, his classification score had decreased to 105.

stop them from fighting, and the officers released two additional chemical agents when they again started to approach one another.

Beyond the June 2012 incident, the People also highlighted the following prison Rule Violation Reports (RVRs) defendant received for aggressive and "anti-authoritarian behavior":

– 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;

– 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 ("[F]eed 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 an inmate in the side of the face, which caused the inmate to fall; and for participating with another inmate to cause a chemical burn to the victim inmate's scalp by throwing an unidentified, white powdery substance on the victim.

The People additionally argued defendant was unsuitable for resentencing because there was no evidence he had addressed his longstanding drug problem nor evidence he made significant strides to "improv[e] himself while incarcerated." According to the People, defendant had never enrolled in a prison drug rehabilitation program and his history in prison included an August 20, 2007, RVR for possession of contraband (a plastic bag containing 167 prescription pills, five inhalers, and one eye drop bottle—all in excess of what he had been prescribed). Defendant also had not attained a GED nor completed a vocational program.

In reply, defendant argued he was suitable for resentencing because (1) his criminal convictions were remote in time (his strike convictions, in particular, occurred more than two decades before the Proposition 36 hearing); (2) his disciplinary record had shown some improvement, including a reduction in his classification score during the most recent review period and no recorded violations in the last four years; (3) he was a "low risk" to recidivate based on his age (56) and the 22-factor California Static Risk Assessment (CSRA) developed by CDCR and the

Center for Evidence-Based Corrections at the University of California, Irvine; and (4) he had suitable reentry plans.

On the issue of post-prison reentry plans, defendant produced a letter from the Amity Foundation indicating it had accepted defendant into its residential program to help him "successful[ly] transition back into the larger community." Defendant also submitted documentation covering his participation in prison therapy programs, including two letters from his counselor in the jail's mental health services' Dual Diagnosis Program that he began in 2016, and summary reports and progress notes from weekly group recreational therapy between August 2009 and March 2010

C. The Trial Court's Ruling

The trial court held a hearing on defendant's Proposition 36 petition and defendant briefly testified during the hearing. He stated he was "not the same person [he] . . . used to be." Defendant admitted he "did have a cocaine problem and a drug problem," but he asserted he had been in a drug program in Los Angeles County Jail and had "plans for when [he is] released," stating his goal was to become a drug counselor.

Defense counsel argued the court should grant the Proposition 36 petition because defendant had served 21 or 22 years of his sentence and defendant "was not the gentleman that [California voters] envisioned continuing and doing life in prison." The defense maintained defendant's prison misconduct did not warrant an unreasonable risk of danger to public safety

finding because "it doesn't take a lot [¶] . . . to get written up."[4] The People, on the other hand, maintained the Proposition 36 petition should be denied based on defendant's "multiple RVRs," "extensive criminal history," and "lack of rehabilitative programming." The court took the matter under submission.

The trial court subsequently issued a 19-page decision denying defendant's Proposition 36 petition, finding he posed an unreasonable risk of danger to public safety. The court explained the applicable legal standard required the People "to prove, by a preponderance of the evidence, that an eligible [defendant] would pose an unreasonable risk of danger if resentenced," but the court understood its "dangerousness determination itself . . . [was] ultimately a discretionary" judgment.

The trial court discussed the evidence presented in light of the statutory factors that govern dangerousness determinations, namely, the defendant's criminal history, his disciplinary and rehabilitation record while incarcerated, and any other evidence the court deemed relevant. (§ 1170.126, subd. (g).) The court characterized defendant's criminal history as "extensive," noting it began in 1979, included drug-related convictions, and culminated with him "assault[ing] two security officers" during his commission of the triggering offenses. The trial court was of the view that "the multiplicity of [defendant]'s prior convictions

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[4] The trial court replied it "underst[ood] like fighting and mutual combat, you know, an inmate is going to have a few of those when they get there. They have to show they're not to be messed with, so they can't back down. So there's a few of those." But the court also emphasized that "[t]he ones when they get into [it] with the correctional officers do concern me."

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 [defendant]'s criminal past and current dangerousness." But the court found such a nexus given defendant's "history of misconduct in prison, elevated classification score, lack of rehabilitative programming, and insufficient reentry plans."

In considering defendant's disciplinary history, the trial court took into account defendant's "advanced age of 57" and the CSRA findings, which the court acknowledged would typically be factors indicating defendant no longer posed a risk of danger to society. But the court believed both of these factors were "contradicted by [defendant's] disciplinary record [in prison], which shows [defendant] getting into fights and assaulting others well into his forties and fifties." The court summarized its view of that disciplinary record: "[Defendant's] disciplinary history reflects a pattern of violent and aggressive conduct, evidencing his inability or unwillingness to respect authority and refrain from fighting . . . . [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 June 2012, which was only a few months before the passage of Proposition 36 and the filing of his Proposition 36 petition, 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."[5]

The trial court further reasoned defendant had not engaged in any prison programming that might ameliorate the risk it perceived in defendant's disciplinary history and drug use. The court was not persuaded that defendant's participation in recreational therapy from August 2009 through March 2010 and a "Dual Diagnosis Program" beginning in January 25, 2016 (six months before the hearing on his Proposition 36 petition)—when viewed in context of his nearly 21-year period of incarceration—was significant evidence of rehabilitation. The court additionally found (1) there was no evidence defendant had "developed any educational or vocational skills in his 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.[6]

The trial court concluded its 19-page order by stating "[t]he evidence as presented . . . show[ed] a [defendant] who has continually committed crimes despite severe repercussions, whose aggressive behavior continued while he was in custody."

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[5] Relatedly, the court noted defendant's most recent prison classification score of 105 "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."

[6] The court explained that the March 6, 2014, letter defendant provided from the Amity Foundation had not been updated and did not describe the program's length. Defendant's plans for after the program ended were unspecified beyond a general claim of family support.

Given "[defendant]'s criminal history, misconduct in prison, elevated classification score, lack of rehabilitative programming, and inadequate re-entry plans," the court "in its discretion and pursuant to section 1170.126, subdivision (f)," found defendant "pose[d] an unreasonable risk of danger to public safety and is not suitable for resentencing."

II. DISCUSSION

Defendant's opening brief argued Proposition 47's narrower definition of "unreasonable risk of danger to public safety," namely, "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667"[7] applied to his Proposition 36 petition. His opening brief

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[7] "The cited subdivision of section 667 identifies eight types of particularly serious or violent felonies, known colloquially as 'super strikes.'" (*Valencia*, *supra*, 3 Cal.5th at p. 351.) "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 . . . 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." (*Valencia*, *supra*, at p. 351, fn. 3.)

further argued the trial court erred because the facts did not support a finding of dangerousness under that heightened standard. Once our Supreme Court decided *Valencia*, these became losing arguments, as defendant conceded in his reply brief. Defendant, however, attempted to salvage his claim on appeal by recasting his argument as one that challenges the trial court determination even though the Proposition 47 definition of dangerousness does not apply.

The argument made only in reply, that the trial court erred in concluding defendant posed a mere unreasonable risk of danger to public safety (not a danger of committing a "super strike"), was waived by failing to raise it in the opening brief. Nevertheless, we will briefly explain why defendant's belated argument fails on the merits. We further hold, for reasons discussed *post*, the unreasonable risk of danger to public safety standard in Proposition 36 is not unconstitutionally vague under *Johnson v. United States* (2015) ___ U.S. ___ [135 S.Ct. 2551] (*Johnson*).

A. Defendant Waived His Argument that the Trial Court's Proposition 36 Dangerousness Finding Is Erroneous

Defendant's opening brief argues only that he does not pose an unreasonable risk of danger to public safety under what he viewed as the proper standard of review, i.e., the "clarified standard set out in Proposition 47." The opening brief makes no argument that the trial court's dangerousness finding was erroneous if the Proposition 47 standard did not apply. This, of course, was not lost on the Attorney General, whose 10-page respondent's brief notes that "[defendant] makes no argument

that the trial court abused its discretion in finding he posed an 'unreasonable risk of danger to public safety' as that term is defined under Proposition 36 . . . ." No such argument having been properly raised, the Attorney General understandably limited his argument to observing, correctly, that *Valencia* was dispositive of defendant's contentions. (*Valencia*, *supra*, 3 Cal.5th at p. 375 ["[W]e decline to credit defendants' proposed interpretation of section 1170.18, subdivision (c) as enacted by Proposition 47, the Safe Neighborhoods and Schools Act. Given the circumstances, it is reasonable to interpret section 1170.18, subdivision (c)'s definition of an 'unreasonable risk of danger to public safety' as applicable only to the resentencing proceedings that are authorized under Proposition 47"].)

With *Valencia* on the books, defendant changed tack in his reply brief, asserting for the first time that the trial court's ruling on his Proposition 36 petition was error even if the Proposition 47 standard did not apply.[8] Such a change is not permitted. The failure to present the argument in the opening brief forfeits defendant's ability to make the argument in reply—when the

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[8] Defendant devoted five pages of the brief to an attempt to establish the Attorney General was "entirely incorrect that [defendant's] sole argument is based exclusively on the Proposition 47 standard." Defendant, for instance, argued that his opening brief analyzed his "criminal history and prison conduct under the legal framework of the [*In re*] *Lawrence* [(2008) 44 Cal.4th 1181 (*Lawrence*)] decision," and this meant the argument was preserved because "*Lawrence* is not a Proposition 47 case." Having read the opening brief ourselves, defendant's arguments in this respect are unconvincing. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

Attorney General has no ability to respond. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219 ["'[I]t is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party'"]; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 349-350 ["By waiting until his reply brief to argue that the prosecution's use of strikes should be subjected to a comparative juror analysis, [the defendant] has forfeited the issue"].)

B. The Contention That the Trial Court Erred in Finding Defendant Posed an Unreasonable Risk of Danger to the Public Fails on the Merits in Any Event

Under section 1170.126, if a defendant is serving an indeterminate life sentence imposed pursuant to the Three Strikes law, the court "shall" resentence the defendant as a second strike offender, "unless the court, in its discretion, determines that resentencing the [defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) A court, in exercising its discretion, may consider: "(1) The [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) The [defendant]'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); *Valencia*, supra, 3 Cal.5th at p. 354 [referencing a trial court's "broad discretion" under section 1170.126, subdivision (g)]; see also *People v. Frierson* (Dec. 28, 2017, S236728) ___Cal.5th ___

[2017 WL 6614838, at *6] [dangerousness must be proven by a preponderance of the evidence].)

The trial court properly exercised its statutory discretion in denying defendant's petition. As to defendant's criminal history, the trial court acknowledged defendant's convictions were "remote," but it reasonably found "his criminal history remain[ed] probative of his current risk of danger to public safety," given his history of misconduct in prison, elevated classification score, and lack of rehabilitative programming. In addition, and as the trial court correctly recognized, serious rule violations while incarcerated are probative of recidivist tendencies and whether resentencing a defendant would endanger the public. (See § 1170.126, subd. (g)(2); *In re Reed* (2009) 171 Cal.App.4th 1071, 1084-1086.) The trial court found "[defendant]'s disciplinary history reflects a pattern of violent and aggressive conduct, evidencing his inability or unwillingness to respect authority and refrain from fighting." That, too, was a reasonable judgment. A four-year détente in context of a longer 21-year prison history that includes multiple assaults on prison staff and violent altercations occurring through defendant's forties and fifties is not a sufficiently reliable basis to conclude the trial court was clearly wrong to conclude defendant posed an unreasonable threat to public safety. This is especially true when, as the trial court noted, defendant has made minimal efforts to participate in rehabilitative programming while in prison. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(9) ["Institutional activities indicate ability to function within the law upon release"].)

C. *Proposition 36's "Unreasonable Risk of Danger to Public Safety" Standard Is Not Unconstitutionally Vague under* Johnson

Defendant argues *Valencia*'s refusal to apply the Proposition 47 dangerousness definition to Proposition 36 petitions means that section 1170.126, subdivision (f) is "unconstitutionally vague under the reasoning of *Johnson* . . . ." The argument is meritless, as *Valencia* itself indicates.

In *Johnson*, the high court held void for vagueness the residual clause of the Armed Career Criminal Act (ACCA), which defined the statutory term "violent felony" to mean a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." (*Johnson*, *supra*, ___ U.S. at pp. ___ [135 S. Ct. at pp. 2555, 2557].) The residual clause, as construed, required courts to imagine the type of conduct involved in an "ordinary case" of a charged crime and then "judge whether that abstraction present[ed] a serious potential risk of physical injury." (*Id.* at p. 2557.) The high court reasoned there was "grave uncertainty" about how to estimate the risk posed by a crime in an imagined, ordinary case because it was unclear how to determine what kind of conduct is involved in an ordinary case of a crime. (*Ibid*.) In addition, the *Johnson* court explained the residual clause's "serious potential risk of physical injury" standard was "imprecise," and that imprecision left too much uncertainty about how much risk is necessary for a crime to qualify as a violent felony when the standard is applied not to "real-world facts" but rather to a "a judge-imagined abstraction." (*Id.* at p. 2558.)

The problem in *Johnson* is not a problem here. As our Supreme Court stated in *Valencia*, "[f]ollowing the enactment of

Proposition 36, Courts of Appeal have rejected arguments that the phrase 'unreasonable risk of danger to public safety,' as used in section 1170.126, subdivision (f), is unconstitutionally vague. (See, e.g., *People v. Garcia* (2014) 230 Cal.App.4th 763, 769-770[ ] (*Garcia*); *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075[ ] (*Flores*) ['Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety'].)" (*Valencia*, *supra*, 3 Cal.5th at pp. 354-355.) By citing *Garcia* and *Flores* with approval, our Supreme Court implicitly rejected defendant's argument, and we reject it explicitly. The trial court's discretionary judgment concerning defendant's dangerousness to public safety was based on real-world facts.

DISPOSITION

The order denying defendant's section 1170.126 petition is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

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.