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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CASTRO RODRIGUEZ, Defendant and Appellant.	B280078 (Los Angeles County Super. Ct. No. GA035695)

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

Arielle Bases, 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, Mary Sanchez and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Anthony Castro Rodriguez appeals from an order denying his petition under Proposition 47, the Safe Neighborhoods and Schools Act, to reclassify his felony conviction for petty theft with a prior theft-related conviction (Pen. Code, § 666)[1] as a misdemeanor. The trial court denied the petition on the ground Rodriguez currently poses an unreasonable risk of danger to public safety under section 1170.18, subdivisions (b) and (c).

Rodriguez argues that the trial court's denial of his petition was an abuse of discretion and violated his due process and equal protection rights. He also argues the trial court erred in failing to rule on his petition under Proposition 36, the Three Strikes Reform Act, for recall of his sentence and resentencing as a second strike offender. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Rodriguez's Criminal History*

Prior to 1998, when he began his current indeterminate prison term, Rodriguez had a long history of committing crimes, some of them violent and involving the use of deadly weapons, including three serious or violent felonies under the three strikes law (§§ 667, subds. (b)-(i), 1170.12). Rodriguez's criminal history began in 1974, when Rodriguez was 15 years old, and the juvenile court sustained a petition for sale or transportation of marijuana or hashish. In 1976, when Rodriguez was 17 years old, the

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1 Undesignated statutory references are to the Penal Code.

juvenile court sustained a petition for robbery and placed Rodriguez in a juvenile camp.

In 1977, when Rodriguez was an adult, he was arrested for drunk driving. He pleaded guilty to reckless driving, and the court placed him on probation for 36 months. He was also convicted of shoplifting and placed on probation for 12 months.

In 1981 Rodriguez was convicted of his first serious felony, robbery with the use of a firearm (§§ 211, 12022.5), after he used a .22 caliber rifle to rob $120 from a drive-in dairy.[2] The court in that case sentenced Rodriguez to four years in prison, and he was paroled in February 1984. While on parole, Rodriguez was convicted of being under the influence of a controlled substance, phencyclidine. The court in that case also found Rodriguez had violated the terms of his parole and returned Rodriguez to prison. In 1985, after he had been released from prison again, he violated the terms of his parole and was sent back to prison.

After he was released from prison in 1986, Rodriguez committed his second serious felony, resulting in a 1988 conviction for voluntary manslaughter (§ 192, subd. (a)). In that case Rodriguez and a companion beat and stabbed a man to death and left his body in a park. Witnesses who spoke with Rodriguez shortly after the killing described him "as being very high on an amphetamine-type drug." The court sentenced Rodriguez to a prison term of three years, plus five years for the prior serious felony conviction under section 667, subdivision (a). He was paroled in 1992.

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[2] Rodriguez was also convicted of taking a vehicle for temporary use, a misdemeanor, and the court placed him on probation for 24 months.

Less than two months after he was paroled, Rodriguez committed his third serious felony, attempted second degree robbery, after he and a companion kicked and beat someone who refused to give them money. The court sentenced Rodriguez to six years four months in state prison. He was paroled in July 1995.

Two months later, Rodriguez was arrested after a violent altercation with his girlfriend. He was convicted of corporal injury on a spouse or cohabitant, and the court placed him on probation for 36 months on the condition he serve a jail term. Rodriguez was released from custody in 1996 but shortly thereafter returned to prison after violating the terms of his parole in the voluntary manslaughter case when he was arrested for forcible sexual penetration with a foreign object.

B. *Rodriguez's Current Offense*

On April 13, 1998 Rodriguez, another man, and the man's preteen daughter went through a department store, taking items and placing them in shopping bags or hiding them under their clothes. After the three of them left the store, loss prevention agents confronted them. Rodriguez ignored orders by the loss prevention officers to stop, but police officers eventually detained him. The value of the items he stole from the department store was $144.

On July 20, 1998 a jury convicted Rodriguez of petty theft with a prior theft-related conviction. The court found true allegations he had three prior serious felony convictions: the 1981 conviction for robbery, the 1988 conviction for voluntary manslaughter, and the 1992 conviction for attempted robbery.

The court sentenced Rodriguez to a prison term of 25 years to life under the three strikes law.

C. *Rodriguez's Prison Record*

From 2000 to February 2015, while he was serving his prison term for the 1998 conviction, Rodriguez received over 18 Rules Violation Reports (RVRs) for serious violations of prison rules and regulations.[3] The behavior that led to Rodriguez's RVRs included engaging in conduct that could lead to violence, fighting with other inmates, disobeying orders, refusing to report to assignments, refusing urinalysis, engaging in mutual combat, manufacturing alcohol, disrespecting prison staff and guards, striking a correctional officer, expressing excess familiarity with prison staff, refusing to return to his cell, and stealing food from the dining room. Rodriguez also received four administrative violations and numerous "chronos"[4] for less serious misconduct

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[3] "[A]n RVR is issued for a serious rules violation. The California Code of Regulations gives a non-exhaustive list of examples of serious rules violations to include such circumstances as: use of force or violence against another person, a breach of or hazard to facility security, a serious disruption of facility operations, manufacturing a controlled substance, and willfully inciting others to commit an act of force or violence." (*Quiroz v. Horel* (N.D.Cal. 2015) 85 F.Supp.3d 1115, 1143; see Cal. Code Regs., tit. 15, §§ 3312, subd. (a)(3), 3315, subd. (a); *In re Martinez* (2012) 210 Cal.App.4th 800, 805.) An "RVR is also referred to as a '115' because it appears on a prison form 'CDC 115.'" (*Hurlbert v. Muniz* (N.D.Cal. 2018), No. 15-CV-04357-JSC, 2018 WL 1399886, at p. 3, fn. 4.)

[4] "Chronos"—custodial counseling chronology reports—document less serious rules violations. (Cal. Code Regs., tit. 15,

that included disruptive behavior, stealing fruit from the dining hall, disobeying orders, refusing to report to assignments, refusing to leave the shower, disrespecting a peace officer, and refusing to take medication. These violations continued through January 2015, even after Rodriguez had filed his Proposition 36 petition in March 2013. Rodriguez's most recent classification score, which reflects an inmate's security risk,[5] was 55 as of December 2015, four points higher than it had been the previous

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§§ 3000, 3312, subd. (a)(2); *In re Stoneroad* (2013) 215 Cal.App.4th 596, 606, fn. 4; see *In re Smith* (2003) 109 Cal.App.4th 489, 501, fn. 5 [a "counseling chrono [is] used for 'minor misconduct' only and entails no discipline, only counseling"].)

[5] "Under the applicable regulations, 'All persons entering the [CDCR] penal system are given a classification score which determines an inmate's security level. Based on this score, an inmate will be given a designation ranging from Level I—reserved for the lowest security risk prisoner—to Level IV—reserved for the highest security risk prisoner. The score is arrived at by tabulating points that are based on an array of objective factors which include, among other things, length of sentence, nature of the crime committed, criminal history, employment history, military service, marital status, age, prior escape attempts, and prior incarceration behavior.'" (*In re Morales* (2013) 212 Cal.App.4th 1410, 1413.) "'A higher score means the inmate is considered a higher security risk and would be assigned to a correspondingly higher security facility; a lower score means the inmate is considered a lower security risk and would be assigned to a correspondingly lower security facility.'" (*In re Nguyen* (2011) 195 Cal.App.4th 1020, 1025, fn. 1; see Cal. Code Regs., tit. 15, § 3375 et seq.; *In re Jenkins* (2010) 50 Cal.4th 1167, 1173-1174.) The lowest score an inmate serving a life sentence can receive is 19.

year and 34 points higher than it had been when he entered prison.

D. *Rehabilitative Programming and Release Plans*

Although Rodriguez participated in work and education assignments while he was in prison, he was written up a number of times for refusing to attend or for disruptive or disrespectful behavior. Rodriguez participated in a life prisoners support group in July and August 2003. In terms of his plans if he were released from prison, a stepbrother offered to have Rodriguez live with him, and another family member offered him a job as a janitor at a barber shop.

E. *Proposition 36 Petition*

On March 11, 2013 Rodriguez filed a petition for recall of sentence and resentencing under Proposition 36, the Three Strikes Reform Act (§ 1170.126), which had become effective November 7, 2012. (*People v. Johnson* (2015) 61 Cal.4th 674, 680.) The trial court issued an order to show cause. The People opposed the petition and argued Rodriguez was unsuitable for resentencing because his criminal history and institutional misconduct showed that, if resentenced, he would pose an unreasonable risk of danger to society. Rodriguez argued he was suitable for resentencing because of his age and the relatively minor nature of his institutional misconduct.

F. *Proposition 47 Petition*

On July 14, 2015, Rodriguez filed a petition for resentencing under Proposition 47, which had become effective on November 5, 2014. (*People v. Esparza* (2015) 242 Cal.App.4th

726, 735.) The trial court issued an order to show cause. The People opposed the petition and again argued Rodriguez was not suitable for release because he was dangerous.

G. *The Trial Court's Ruling*

The court held two hearings on Rodriguez's Proposition 47 petition. In reviewing Rodriguez's criminal history, the court noted Rodriguez had "a lengthy history of alcohol and drug abuse, and of extremely violent crime. He kicked a man so hard during a robbery that he ripped his entire earlobe from his head; he brutally beat his girlfriend in front of a police station; and he stabbed a man to death and left his body in a park." The court acknowledged that Rodriguez's crimes were remote and that the issue was whether Rodriguez currently posed a risk of danger to public safety. The court ruled that the extremely violent nature of his criminal history, "[i]n combination with his disciplinary misconduct, insufficient rehabilitative programming, and inadequate post-release plan, . . . supports a finding that he *currently* poses an unreasonable risk that he will commit a new violent super strike if released."

With respect to disciplinary misconduct, the court stated it was "most concerned with the 2014 RVR for behavior which would lead to violence and the 2008 RVR for overfamiliarity with staff." In the 2014 incident, Rodriguez was working in the dining hall and "threw a dough cutter across two stainless steel tables toward a correctional officer standing 15 feet away." The officer ordered Rodriguez to leave. Rodriguez at first refused to leave and became argumentative, but eventually he left, shouting obscenities at the officer. In the 2008 incident, Rodriguez "sent a flirtatious letter to a female nurse." When interviewed, he

claimed the nurse had been pursuing him. The interviewer believed Rodriguez might have mental health issues and referred him for an examination, but a clinician concluded Rodriguez's behavior was not the result of a mental health disorder.

The court stated: "Serious rules violations in prison constitute powerful evidence of an inmate's current willingness to engage in serious rule-breaking behavior and are probative of recidivist tendencies and the danger to public safety. [Citations.] Here, [Rodriguez] has received seven serious RVR's since petitioning the court for resentencing [under Proposition 36] on March 11, 2013, indicating that [Rodriguez] cannot manage to follow institutional rules even when facing the prospect of release. Furthermore, [Rodriguez's] long and violent criminal history arose in large part from his alcohol and substance abuse, which makes his July 2013 RVR for manufacturing alcohol particularly probative of his willingness to engage in the type of conduct that made him a danger to society prior to his incarceration for the current offense."[6] The court further found that, over the course of Rodriguez's incarceration, not only had Rodriguez been "unable to conform his behavior to institutional rules and regulations," but also "his behavior has actually gotten worse in recent years. Until 2008—during the first ten years of his incarceration—[he] received only six serious RVR's. In the eight years since then, however, he had doubled that number and

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[6] The court also recounted that Rodriguez "robbed a convenience store with a rifle to steal beer as a juvenile, admitted to a probation officer he had a drinking problem after being arrested for armed robbery in 1981, appeared to be high on amphetamines after he stabbed a man to death in 1986, and was caught manufacturing alcohol in prison . . . ."

incurred a total of 12. In addition, he has been hostile, belligerent, and defiant of authority. Such behavior does not bode well for his ability to comply with parole conditions which the Court would require pursuant to § 1170.18[, subdivision] (d) were it to consider [Rodriguez] for release." The court found that Rodriguez's disciplinary record was evidence of a current unreasonable risk of danger to public safety if Rodriguez were resentenced.

With respect to rehabilitative programming, the court noted Rodriguez's poor record of participation in work and educational assignments and his brief participation in a support group. The court expressed concern Rodriguez had not participated in any programming to address his substance abuse issues. "To demonstrate that [Rodriguez] does not present an unreasonable risk of repeating [the violence he demonstrated in the commission of his crimes], he would have to show the Court that he has taken steps to meaningfully address the root cause of his violent behavior—his history of alcohol and drug addiction. Ultimately, the Court is not assured that two months of participating in a lifer support group in 2003 is sufficient to help [Rodriguez] gain insight into his addiction or develop the tools to abstain from using substances upon release." The court also noted Rodriguez "has not participated in any programs such as anger management, alternatives to violence, victim impact, criminon[7] or other programs to help inmates break themselves free of the criminal mindset. As such, [his] record of rehabilitation is not supportive of release."

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7 Criminon, which stands for "no crime," is Scientology-based educational and self-improvement programming for criminals.

The court also observed that Rodriguez's classification "score of 55 is moderately elevated compared to other inmates seeking resentencing through the [Three Strikes] Reform Act who have successfully reduced their scores to 19 over the course of their incarceration. Therefore, [Rodriguez's] score of 55—particularly since it has risen since he first entered [prison]—is not supportive of release."

The court acknowledged Rodriguez's California Static Risk Assessment (CSRA) score was low, suggesting a low risk of a felony arrest within three years after release. The court stated, however, that this score did not take into account Rodriguez's institutional misconduct. Therefore, the court concluded his low CSRA score was "outweighed by other factors not supportive of release." The court also noted that, although criminality generally decreases after age 40 and Rodriguez was 58, Rodriguez "has not demonstrated that he is 'aging out' of any significant risk of serious criminality upon release given his recent disciplinary record."

Finally, the court considered Rodriguez's post-release plans and acknowledged Rodriguez had a place to live and prospective employment. The court expressed concern, however, Rodriguez "has not provided any evidence that he has contacted self-help or re-entry programs." The court stated that, given Rodriguez's history, participation in a drug treatment program would demonstrate that he took his addiction seriously and had made efforts to rehabilitate himself if released, which in turn would support a finding he was suitable for resentencing. Absent such participation, however, there was an increased risk that Rodriguez would engage in the kind of violent behavior he had engaged in previously. Despite the family support, the court

found Rodriguez's "lack of concrete, verified plans for a substance abuse re-entry program renders his postrelease plan insufficient, particularly when compared with other Prop[osition] 36 petitioners who have provided the Court with letters of acceptance to such programs in the community. The Court thus finds that [Rodriguez's] post-release plan is not supportive of his suitability for resentencing."

The court ruled "that the totality of the evidence contained in the record demonstrates that resentencing [Rodriguez] would pose an unreasonable risk of danger to public safety pursuant to the definition set forth in section 1170.18, subdivision (c) due to his disciplinary record, insufficient record of rehabilitation while incarcerated, and inadequate post-release plans." Therefore, the court denied his Proposition 47 petition.

DISCUSSION

A. *Proposition 47*

"Proposition 47 reclassified as misdemeanors certain drug- and theft-related offenses that previously were felonies or wobblers," including petty theft with a prior theft-related conviction in violation of section 666. (*People v. Valencia* (2017) 3 Cal.5th 347, 355; see § 1170.18, subds. (a), (b).) Proposition 47 contains "a provision allowing felony offenders 'serving a sentence for a conviction' for offenses now reclassified as misdemeanors to petition to have their sentences recalled and to be resentenced." (*Valencia*, at p. 355, citation omitted; see *People v. DeHoyos* (2018) 4 Cal.5th 594, 597 ["Proposition 47 redefined several common theft- and drug-related felonies as

either misdemeanors or felonies, depending on the offender's criminal history"].)

Proposition 47's "resentencing procedure provides that if an inmate 'would have been guilty of a misdemeanor' had Proposition 47 been in effect at the time of the offense, and he or she has no prior convictions for super strikes or any offense that requires registration as a sex offender, the inmate may petition for a recall of his or her sentence and resentencing in accordance with Proposition 47's reclassification of certain offenses as misdemeanors. [Citation.] If the court determines that the petitioner meets these criteria, it must recall the felony sentence and resentence the petitioner based on the new classification of the offense as a misdemeanor, 'unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.'" (*People v. Valencia*, *supra*, 3 Cal.5th at p. 355; see *People v. Brayton* (2018) 25 Cal.App.5th 734, 738; *People v. Simms* (2018) 23 Cal.App.5th 987, 993.)[8] The People have the burden by a preponderance of the evidence to prove that resentencing the defendant would pose an unreasonable risk to public safety. (See *People v. Frierson* (2017) 4 Cal.5th 225, 239 ["several Courts of Appeal have properly concluded that '[t]he facts upon which the court's finding

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[8] A "super strike" for purposes of Proposition 47 is "an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (§ 1170.18, subd. (i).) These include sexually violent offenses, homicide or attempted homicide, and any serious or violent felony punishable by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv)(I), (IV) & (VIII).)

of unreasonable risk is based must be proven by the People by a preponderance of the evidence'"]; *People v. Jefferson* (2016) 1 Cal.App.5th 235, 241 ["the proper standard of proof on a dangerousness finding is the default standard of proof by a preponderance of the evidence"].)

In exercising its discretion to determine whether resentencing the petitioner would pose an unreasonable risk of danger to public safety, "the resentencing 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) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence' the court deems relevant." (*People v. Valencia*, *supra*, 3 Cal.5th at p. 355, quoting § 1170.18, subd. (b)(1)-(3).) However, "Proposition 47 limits the trial court's discretion to deny resentencing by defining the phrase 'unreasonable risk of danger to public safety' narrowly. In connection with resentencing under Proposition 47, '"unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a [super strike].' [Citations.] Thus, under Proposition 47 a resentencing court may not deny a petition for reclassification and resentencing for certain theft and drug possession felonies to misdemeanors for an otherwise eligible petitioner unless it finds that the resentencing would pose an unreasonable risk that the petitioner will commit a super strike." (*Valencia*, at pp. 355-356, quoting section 1170.18, subd. (c).) "We review a dangerousness finding for an abuse of discretion, given that the court is statutorily required to determine dangerousness 'in its discretion.'" (*People v. Jefferson*, *supra*, 1 Cal.App.5th at

pp. 242-243; accord, *People v. Hall* (2016) 247 Cal.App.4th 1255, 1264.)

B. *The Trial Court Did Not Apply the Wrong Legal Standard*

Rodriguez suggests "it is unclear [whether] the trial court ultimately used the correct legal standard to deny [his] section 1170.18 petition. In its opinion, the court does mention the correct section 1170.18 standard . . . , but the court clearly bases its analysis on other standards, such as parole suitability and section 1170.126 standards . . . ." As noted, however, the trial court found that Rodriguez's criminal history, misconduct in prison, lack of rehabilitation programming, and inadequate post-release plans made him a current risk to commit a super strike. The trial also stated at the hearing it was "keeping in mind the very narrow dangerousness standard of Prop[osition] 47" and expressed concern Rodriguez's "weapons record would suggest he's going to likely commit a super strike if he's released from prison." The prosecutor reminded the court "we're talking about the super strikes." The court applied the correct legal standard under section 1170.18, subdivision (c).

It is true that, in discussing the factors for determining resentencing suitability under Proposition 47, the trial court cited cases involving suitability for parole. These cases included *In re Stoneroad* (2013) 215 Cal.App.4th 596, 633-634, fn. 21 [recidivism rates decline after age 40], *In re Montgomery* (2012) 208 Cal.App.4th 149, 164 [a prison "rule violation is some evidence of a risk to public safety and there is a rational nexus between that evidence and a finding of current dangerousness"], *In re Rozzo* (2009) 172 Cal.App.4th 40, 60 [suitability for parole is

determined based on commitment offense, criminal history, and conduct in prison], and *In re Reed* (2009) 171 Cal.App.4th 1071, 1085 ["inability to follow an express direction to comply with the rules of the institution provide[s] *some* current evidence that, when released, petitioner will be unable to follow society's laws"].[9] The court's citation to parole cases does not show the court used the wrong legal standard. It only shows the court looked to these cases because some of the factors considered in these decisions are the same as those considered under Proposition 47. (See § 1170.18, subd. (b) [court may consider petitioner's "criminal conviction history," "disciplinary record and record of rehabilitation while incarcerated," and any other relevant factors].)

The trial court understood that under Proposition 47, "an unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit one of the enumerated offenses specified in section 667, subdivision (e)(2)(C)(iv)—which lists serious and violent felonies that are often referred to as 'super strikes' . . . ." The trial court did not apply the wrong legal standard. (See *People v. Hall*, *supra*, 247 Cal.App.4th at p. 1265 [court "applied the appropriate

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[9] The court also cited the dangerousness provision of Proposition 36, although this citation appears to have been inadvertent, based on the fact that Proposition 47 contains the same provision: "In exercising its discretion, the court may consider all of the following: [¶] . . . [¶] (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).)

standard for determining whether [the defendant" posed an unreasonable risk of danger to public safety" under Proposition 47 where, "[c]ontrary to [the defendant's] assertion, the court did not indicate the unreasonable risk of danger to public safety exception applied merely because [the defendant] was 'generally dangerous' or a violent felon with strike priors," but "[r]ather, the court clearly considered whether [the defendant] presented an unreasonable risk of committing a 'super strike' if resentenced" and therefore "applied the appropriate standard for determining whether [the defendant] posed an unreasonable risk of danger to public safety"].)

C. *The Trial Court Did Not Abuse Its Discretion in Ruling That Resentencing Rodriguez Would Pose an Unreasonable Risk of Danger to Public Safety*

1. *Rodriguez's Criminal History Included Crimes of Violence and Use of Deadly Weapons*

As noted, the court's consideration of a Proposition 47 petitioner's criminal history includes "the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes." (§ 1170.18, subd. (b)(1).) The crimes Rodriguez committed before his 1998 conviction for petty theft with a prior theft-related offense were violent, involved firearms and other dangerous weapons, and often occurred while he was on parole for other crimes. As counsel for Rodriguez appropriately conceded, "I'm not disputing Mr. Rodriguez's criminal history. It is violent. There's no question it involves weapons."

He suffered his first serious (and violent) felony conviction in 1981, when he pleaded guilty to robbery, admitted a firearm allegation, and received a four-year prison sentence. Rodriguez suffered his second serious (and violent) felony conviction in 1988 after he and an accomplice killed a man in a park by stabbing him in the eye. Rodriguez was charged with murder but pleaded guilty to voluntary manslaughter and received a prison term of eight years. And Rodriguez suffered his third serious felony conviction in 1992, when he and an accomplice struck the victim in the face, knocked him to the ground, and kicked him in the head so hard they tore his earlobe off his head. He was convicted of attempted robbery and sentenced to a prison term of six years four months. Thus, even before Rodriguez committed his commitment offense in 1998, he was a third strike offender.

But then in 1996 Rodriguez was convicted of inflicting corporal injury on a spouse or cohabitant after he prevented his girlfriend from entering a police station by punching, kicking, and slapping her "numerous times around the face, arms, and back." He was sentenced to probation for three years on the condition he serve 223 days in jail. Later that year he violated his parole by committing a forcible act of sexual penetration when he sexually assaulted an intoxicated 15-year-old girl, took off her pants and underwear, and put his finger in her vagina.

As Rodriguez points out, and the trial court acknowledged, Rodriguez committed most of his crimes long before his Proposition 47 hearing, with his last offense occurring 18 years earlier. The remoteness of Rodriguez's crimes, however, is tempered by the fact he has been in prison since the commission of his last offense. (Cf. *People v. Loy* (2011) 52 Cal.4th 46, 62 [prior crimes were not remote for purposes of Evid. Code, § 352

where defendant had been in prison a significant portion of the intervening time and thus had little opportunity to commit additional crimes]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 315 ["[i]n deciding a defendant's 'prospects' for committing future crimes, the sentence imposed by the trial court is itself a factor, since the defendant presumably will have fewer opportunities to commit crime while in prison"].) Rodriguez did not commit any crime in public after 1998 because he was in prison, where, over the next 15 years, he continued to demonstrate his inability to comply with the law by compiling a lengthy list of serious rules violations.

2. *Rodriguez's Prison History Includes Numerous Serious Rules Violations*

Among his dozens of rules violations in prison, Rodriguez in 2007 engaged in mutual combat with another inmate in a cell, where Rodriguez kicked the inmate in the chest. In 2008 Rodriguez tried "to pursue an over familiar relationship" with a nurse and wrote in a letter to the nurse "I only want you" and "sweetie please keep this between us." In 2009 Rodriguez fought another inmate, where the two of them struck "each other in the face and upper torso area with their fists." In 2010 Rodriguez resisted a correctional officer during an emergency procedure near the basketball court and struck the officer in the chest with his right shoulder, which required a group of responding officers to restrain Rodriguez and shackle his legs. In 2013 Rodriguez stole food from the dining room, and in July 2013, four months after filing his Proposition 36 petition, Rodriguez was caught

manufacturing alcohol in his cell using "kicker."[10] In 2013 Rodriguez hid opioid pain medication he had received from the mediation window and put it in his front shirt pocket. In 2014 Rodriguez "threw a dough cutter across two stainless-steel tables," "became very argumentative," and "shouted obscenities," which the prison designated as behavior that could lead to violence.

Such misconduct in prison "constitutes evidence of [his] willingness to engage in serious rule breaking behavior despite having received a substantial criminal sanction." (*In re Rozzo*, *supra*, 172 Cal.App.4th at p. 60, fn. omitted; see *In re Reed*, *supra*, 171 Cal.App.4th at pp. 1085 ["Does petitioner's inability to follow an express direction to comply with the rules of the institution provide *some* current evidence that, when released, petitioner will be unable to follow society's laws? It does."]; see also *In re Montgomery*, *supra*, 208 Cal.App.4th at p. 164 ["[t]here is a rational nexus between a demonstrated unwillingness or inability to adhere to the reasonable conditions of parole and a current threat to public safety"].) The court found that the most significant "behavior that could lead to violence was throwing the pastry cutter in the kitchen." In addition, as the trial court recognized, Rodriguez could not even refrain from institutional misconduct after filing his Proposition 36 petition. Indeed, the fact that his misconduct increased after he filed his Proposition 36 petition, when he knew his conduct would be under particular scrutiny, strongly suggests he had not made much progress in

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[10] "Kicker" is "a substance used to start the process of inmate-manufactured alcohol . . . made from apples." (*Knight v. Evans* (N.D.Cal., Jan. 25, 2011, No. C 08-03546 LHK PR) 2011 WL 289930, at p. 1.)

rehabilitation since committing violent crimes in the 1980's and 1990's. His numerous RVRs, combined with his criminal history of homicide, armed robbery, sexual assault, and domestic violence, justified the trial court's conclusion that, if released, Rodriguez was likely to commit a super strike.

3. *Rodriguez's Efforts at Rehabilitation Were Limited*

Rodriguez challenges the trial court's findings that he had insufficient rehabilitative programming. He argues he took "a significant step . . . to 'break himself free of the criminal mindset'" when, in 2002, he "requested that he be placed on the Sensitive Needs yard because he 'did not want to be involved with any more of the Southern Hispanic politics.'" He contends "the court failed to recognize this was a significant step in Rodriguez's rehabilitation—avoiding inmates involved in violent criminality." The record shows, however, Rodriguez asked prison authorities to place him on the Sensitive Needs Yard because he was threatened with assault and reported "his life is in danger and he fears for his safety." Rodriguez's request was evidence of self-preservation, not rehabilitation.

Rodriguez also asserts he participated in substance abuse programming. The record, however, does not support his assertion. An RVR Rodriguez received in 2000 for refusing urinalysis states he "was selected to participate in the Drug Reduction Strategy Program on July 26, 2000. On Sunday, July 30, 2000, at 0735 hours, RODRIGUEZ was contacted and periodic contact was made during the next four and a half hours." When prison authorities told Rodriguez a failure to give a urine sample would be considered a refusal, he responded, "'I tried, I just could

not go, the timing was bad.'" This is not evidence of his participation in substance abuse programming.

The record also reflects minimal and lackluster participation in rehabilitative or educational programming, even after the voters passed Proposition 36 and the possibility of an early release became a reality. As noted, Rodriguez had little if any participation in programs for drug addiction, anger management, self-improvement, vocational training, or counseling. Although in July and August 2003 Rodriguez participated in a support group for prisoners serving life sentences, the court was justifiably concerned this was not enough. As counsel for Rodriguez acknowledged, "There has not been massive amounts of programming."

Rodriguez's efforts at rehabilitation stand in contrast to the defendant who successfully sought parole in *In re Vasquez* (2009) 170 Cal.App.4th 370. The defendant in that case had "attended adult literacy classes, worked to obtain his GED and availed himself of an array of self-help and therapy," "received vocational training in auto painting, received a certificate in food service and held eleven different institutional jobs." Prison officials stated the defendant "was an 'exceptional worker' and 'would be a productive member of society if given a second chance,'" was "'competent and eager to take on new tasks' and demonstrated maturity," and had "maintained contact with his mother and others over the years and made postrelease plans to live with his mother and work nearby." (*Id.* at pp. 377-378.) In contrast, Rodriguez has made no effort to develop "'marketable skills that can be put to use upon release'" or to participate in "'[i]nstitutional activities indicat[ing] an enhanced ability to

function within the law upon release.'" (*In re Stoneroad*, *supra*, 215 Cal.App.4th at p. 623.)

As for Rodriguez's post-release plans, he states that if he is released he will be on parole, and the court can order him to participate in appropriate programming and monitor his compliance. He argues: "In this context, lack of a specific programming plan prior to his release does not indicate Rodriguez will not [participate in a] program or that he poses a risk of committing a superstrike if released." Considering Rodriguez's history of noncompliance with programming and lack of any significant effort to rehabilitate himself, however, the court had good reasons for doubting Rodriguez would suddenly become compliant with a court-ordered program designed to prevent him from relapsing into drug or alcohol abuse or criminal behavior.

Rodriguez's CSRA score was low, and the court considered that factor. But it was only one factor. A CSRA score is "an actuarial tool that computes the likelihood to re-offend" (Cal. Code Regs., tit. 15, § 3768.1, subd. (c)), but it is only one tool. The trial court did not abuse its discretion in ruling the violent nature of Rodriguez's crimes, use of weapons in the commission of those crimes, multiple parole violations, history of serious rules violations in prison, and lack of any significant record of rehabilitation outweighed the fact that one evaluative tool suggested he was a low risk of committing a super strike. The trial court used the correct legal standard, considered the correct factors, and properly exercised its discretion in finding that resentencing Rodriguez would pose an unreasonable risk he would commit a super strike offense. (See *People v. Jefferson*, *supra*, 1 Cal.App.5th at p. 245 ["the evidence amply supports the

court's determination that defendant posed an unreasonable risk of danger to public safety, that is, that he was likely to commit a super strike . . . if resentenced"]; *People v. Hall*, *supra*, 247 Cal.App.4th at p.1265 ["trial court also expressly considered each enumerated factor [in (§ 1170.18, subd. (b)(1)-(3))] in exercising its discretion," and "[t]he court's 'dangerousness' finding is supported by those same factors—[the defendant's] criminal record and his record of rehabilitation"].) We have no basis for reversing the trial court's exercise of discretion.[11]

D. *Proposition 47 Does Not Violate Equal Protection*

Rodriguez argues Proposition 47 violates the Equal Protection clause because it treats petitioners like him, who are currently incarcerated, differently from those who are being sentenced in the first instance or who have served their sentence. Rodriguez argues: "Section 1170.18 provides the resentencing judge limited discretion, applicable only to those who seek modification of their judgment while still serving the felony sentence, to deny relief if the judge finds modifying the judgment creates an 'unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) The legislation did not grant judicial discretion to sentence a current offender to felony punishment (see, e.g., § 666, subd. (a)) or to deny modification of

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11 Rodriguez argues the "failure of the trial court to properly apply state law at sentencing violates the due process clause of the Fourteenth Amendment and the California Constitution." The trial court however, properly applied state law under Proposition 47. Therefore, the trial court did not violate Rodriguez's due process rights.

judgment to those seeking it who have already completed service of their felony term (§ 1170.18, subd. (f)). This differential in treatment is not justified by the purpose of the act and has no rational basis."

Rodriguez, however, did not make this argument in the trial court, thus forfeiting it. (See *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 [defendant's failure to "raise his equal protection claim in the trial court" forfeited the argument]; *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1447 ["an equal protection claim may be forfeited if it is raised for the first time on appeal"].) Moreover, even exercising our discretion to address the issue on the merits (*People v. Watson* (2017) 8 Cal.App.5th 496, 517), the equal protection argument lacks merit. """The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."" (*People v. Morales* (2016) 63 Cal.4th 399, 408; see *Briggs v. Brown* (2017) 3 Cal.5th 808, 842 [""a threshold requirement of any meritorious equal protection claim 'is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner"""].) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)

Rodriguez is not similarly situated to defendants who are "current offenders" (i.e., convicted and sentenced after the adoption of Proposition 47) or to defendants who have "completed service" or their felony term. Unlike an individual who is convicted and sentenced after the adoption of Proposition 47, Rodriguez committed a crime that at the relevant time was a felony, not a misdemeanor, and he has been under the supervision and jurisdiction of the Department of Corrections and Rehabilitation pursuant to a sentence properly imposed under the law in effect at the time he was sentenced. Rodriguez was never subject to a misdemeanor sentence, and the newly convicted defendant convicted after the adoption of Proposition 47 is not subject to a felony sentence as Rodriguez was. And even if Rodriguez were similarly situated to a defendant sentenced after the effective date of Proposition 47, prospective application of a statute that lessens the penalty for a crime does not violate the equal protection rights of a prisoner whose judgment is final. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 178; see *People v. Jones* (2016) 1 Cal.App.5th 221, 231-232, review granted Sept. 14, 2016, S235901; see *People v. Floyd* (2003) 31 Cal.4th 179, 188 [rejecting the argument that "an equal protection violation aris[es] from the timing of the effective date of a statute lessening the punishment for a particular offense"].)

Rodriguez is also not similarly situated to defendants who, unlike Rodriguez, have completed their sentences. Such defendants have served their sentences and are not seeking release from prison earlier than they otherwise would have been released. Thus, they are not in a position where the court can deny them early release if they pose an unreasonable risk of

danger to public safety. (See *People v. Morales*, *supra*, 63 Cal.4th at p. 408; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253-254.)

E. *The Trial Court's Error in Not Ruling on Rodriguez's Proposition 36 Petition Was Harmless*

The trial court did not rule on Rodriguez's Proposition 36 petition. The court's failure to do so, however, did not prejudice Rodriguez.

"[I]n contrast to Proposition 36, Proposition 47 limits the trial court's discretion to deny resentencing by defining the phrase 'unreasonable risk of danger to public safety' narrowly." (*Valencia*, *supra*, 3 Cal.5th at p. 355.) To deny resentencing under Proposition 47, the court must find resentencing the defendant would pose an unreasonable risk of committing a super strike. (*Id.* at p. 356.) Here, the court's finding that resentencing would pose an unreasonable risk Rodriguez would commit a super strike satisfies the broader standard of dangerousness in Proposition 36. If Rodriguez is not entitled to relief under Proposition 47 because he poses an unreasonable risk of committing a super strike, he necessarily is not entitled to relief under Proposition 36 because he poses an unreasonable risk of danger to public safety.

DISPOSITION

The order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.