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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CURTIS ROBERTSON, Defendant and Appellant.	B270696 (Los Angeles County Super. Ct. No. VA046861)

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

Lynette Gladd Moore; Arielle Bases, 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, Senior Assistant Attorney General, Mary Sanchez and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Following a combined suitability hearing under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36 (Pen. Code, § 1170.126),[1] and the Safe Neighborhoods and Schools Act, passed by the voters as Proposition 47 (§ 1170.18), the trial court found resentencing Michael Curtis Robertson would pose an unreasonable risk of danger to public safety and denied his petitions for recall of his prison sentence. On appeal Robertson contends the trial court's finding was not supported by substantial evidence. Robertson also argues the People were required to prove his dangerousness to a jury beyond a reasonable doubt and his right to equal protection of the law was violated by Proposition 47. We affirm the trial court's orders denying Robertson's Proposition 36 and Proposition 47 petitions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Instant Offense*

On November 12, 1998 a jury found Robertson guilty of possession of a controlled substance (heroin) (Health & Saf. Code, § 11350, subd. (a)) and possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11377, subd. (a)). The trial court found true specially pleaded allegations that Robertson had suffered four prior serious or violent felony convictions—one for first degree burglary in 1980 and three for robbery in 1984. The court sentenced Robertson under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) to concurrent indeterminate state prison terms of 25 years to life.

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[1] Statutory references are to this code unless otherwise stated.

2. *Robertson's Petitions for Recall of Prison Sentence*

On March 29, 2013 Robertson filed a petition for recall of his sentence and resentencing under Proposition 36, which amended the three strikes sentencing scheme to provide, in general, that a recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent, unless the offense satisfies other criteria identified in the statute.[2] The amendments also allow inmates previously sentenced to indeterminate terms under the three strikes law to petition for recall of their sentences and resentencing to the term that would have been imposed for their crime had they been sentenced under the new sentencing provisions. (§ 1170.126, subd. (a).) Robertson argued in his petition that his nonviolent third strike convictions for possession of controlled substances made him eligible for recall of sentence and resentencing under Proposition 36.

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[2] Prior to Proposition 36 the three strikes law provided that a defendant convicted of two prior serious or violent felonies would be subject to an indeterminate life sentence of at least 25 years to life upon conviction of a third felony, whether or not that felony was serious or violent. (See *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285-1286.)

Under the amended law a defendant with two prior qualifying strike convictions is not subject to an indeterminate life sentence as a third strike offender when the current offense is neither serious nor violent (§ 1170.126, subd. (e)(1)) and does not meet one of the criteria in section 667, subdivision (e)(2)(C)(i)-(iii) (§ 1170.126, subd. (e)(2)), and none of the defendant's prior strike convictions was for one of the offenses listed in section 667, subdivision (e)(2)(C)(iv) (§ 1170.126, subd. (e)(3)).

In their opposition to the petition the People conceded Robertson was eligible for resentencing under Proposition 36 but argued he was not suitable for resentencing because it would pose an unreasonable risk of danger to public safety under section 1170.18, subdivisions (b) and (c). In support of their position the People cited Robertson's extensive criminal background, disciplinary history while in prison and association with a violent prison gang. In his reply Robertson denied any involvement with a prison gang, stated he had made use of available programming in prison and had the lowest possible classification score (a lower placement score indicates lower security control needs). He also emphasized his age (now 58), the remoteness of his past offenses and his deteriorating health as factors making it unlikely he would pose a risk to public safety.

On December 23, 2014, while his Proposition 36 petition was pending, Robertson filed a petition for resentencing under Proposition 47. Robertson stated the felony violations for which he had been convicted (violation of Health & Saf. Code, §§ 11350, subd. (a), & 11377, subd. (a)) had since become misdemeanors pursuant to Proposition 47.[3] The People opposed the petition on

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[3] "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "'As summarized by the Legislative Analyst, the proposition "reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes" and "allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences."'" (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 742.)

the ground Robertson was unsuitable for resentencing under Proposition 47 for the same reasons asserted in opposition to his Proposition 36 petition.[4]

3. *The Hearing on the Petitions*

The trial court conducted a combined hearing on the Proposition 36 and Proposition 47 petitions on September 29, 2015, November 12, 2015 and November 18, 2015.

a. *Criminal history*

The People presented evidence of Robertson's criminal history, which (excluding juvenile offenses) goes back to 1978. Between 1978 and June 1984 Robertson suffered three convictions for receiving stolen property (§ 496), two convictions for disorderly conduct (§ 647) and convictions for vandalism (§ 594), first degree burglary (§ 459) with an enhancement for weapon use (§ 12022, subd. (b)),[5] carrying a concealed weapon (former § 12025) and being under the influence of a controlled substance (former Health & Saf. Code, § 11550).

In July 1984 Robertson committed three robberies for which he was convicted on November 6, 1984. In the first robbery, on July 16, 1984, Robertson and a codefendant entered a liquor store; Robertson pointed a revolver at the clerk and demanded money from the cash register. On July 20, 1984

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[4] It is not clear from the People's opposition whether they challenged Robertson's eligibility for resentencing under Proposition 47. Regardless, the trial court held Robertson was eligible for resentencing under Proposition 47 and issued an order to show cause why the petition should not be granted. The People do not dispute the eligibility finding on appeal.

[5] This conviction constituted Robertson's first strike offense.

Robertson entered a donut shop brandishing a revolver and a sawed-off shotgun and demanded money from the register. On July 22, 1984 Robertson and a codefendant entered a market and demanded money from the register. Robertson was holding a knife during this robbery. Robertson was convicted of three counts of robbery (§ 211) and admitted specially pleaded allegations of personal use of a firearm (§ 12022.5) as to two counts and personal use of a deadly weapon (§ 12022, subd. (b)) as to the third count.[6] Robertson was sentenced to 10 years in prison.

Between 1993 and 1996 Robertson was convicted of driving under the influence of alcohol (Veh. Code, § 23152), possessing a dangerous weapon (former § 12020, subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and threatening a public officer (§ 71). The record also reflects Robertson violated parole on at least eight separate occasions.

On February 12, 1998 Robertson was arrested for the instant offenses after a vehicle in which he was a passenger was pulled over by a sheriff's deputy for having a cracked windshield. The deputy observed Robertson displaying signs of intoxication and saw him place a small black case on the floor. The deputy searched the case and found substances resembling heroin and methamphetamine. After his conviction by a jury, Robertson was sentenced as a third strike offender to concurrent indeterminate state prison terms of 25 years to life.

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[6] These convictions constituted Robertson's second, third and fourth qualifying strike offenses.

b. *Aryan Brotherhood affiliation*

The People presented evidence Robertson had been affiliated with the Aryan Brotherhood while incarcerated. The People's expert, Special Agent Michael Halualani of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives, testified the Aryan Brotherhood is a powerful prison gang operating throughout California prisons that takes part in "extortion, narcotics trafficking, [and] contract murders both in prison and outside of prison." Halualani also testified the Aryan Brotherhood is heavily involved in making weapons for use by inmates in California prisons.

In 1992, while serving a prison sentence on a prior conviction, the California Department of Corrections and Rehabilitation (CDCR) found Robertson was affiliated with the Aryan Brotherhood. During Robertson's subsequent incarcerations the CDCR has re-validated Robertson as affiliated with the Aryan Brotherhood on seven separate occasions, most recently in 2014. Because of this affiliation Robertson has been placed in a security housing unit for the entirety of his current incarceration.

The evidence of Robertson's affiliation with the Aryan Brotherhood includes statements by a confidential informant in 2008 that Robertson made weapons for a validated Aryan Brotherhood member and statements by another confidential informant that Robertson repeatedly hid "hot mail" in 2009 and 2010 on behalf of a validated member of the Aryan Brotherhood.

In 2012 Robertson was found guilty of a serious rules violation after refusing to relinquish his breakfast tray. The refusal was found to be part of a coordinated effort by the Mexican Mafia, the Aryan Brotherhood and the Nazi Low Riders

during which approximately 80 inmates refused to relinquish their food trays. Robertson attended the hearing on the rules violation but denied any wrongdoing. He was found guilty of promotion of gang activity, a division F offense (the least serious category of offenses). In a 2013 written response to a gang validation investigation Robertson again denied any wrongdoing in the food tray incident and stated he was never asked to relinquish his tray that day. In a 2015 interview with his expert witness, Richard J. Subia, conducted in preparation for his suitability hearing, Robertson stated the food tray incident had nothing to do with gang activity but was actually a coordinated protest of an unofficial policy instituted by one of the guards.

Robertson has repeatedly denied involvement with the Aryan Brotherhood. However, in a 1996 interview with Special Agent Halualani,[7] Robertson admitted he had been asked to become a member of the gang but had declined. Robertson said he had "close ties" with Aryan Brotherhood members and was considered an "associate member." Robertson also told Halualani that prior to his 1995 release from prison he had been ordered by an Aryan Brotherhood member to murder another member. Robertson did not commit the murder.[8] He stated he was trying to disassociate from the Aryan Brotherhood and believed he was in danger for failing to commit the ordered murder.

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[7] The 1996 interview was conducted by Halualani and a detective from the Los Angeles Sheriff's Department as part of an investigation into the Aryan Brotherhood.

[8] Halualani confirmed the individual whom Robertson was ordered to kill is still alive.

c. *Conduct while incarcerated and plans for release*

Robertson committed another serious rules violation in January 2000 after a fight with his cellmate during which Robertson would not stop fighting until pepper-sprayed and refused to be handcuffed. Robertson was found guilty of mutual combat, a division D offense. Robertson currently has a classification score of 19, the lowest possible for a three strikes offender, down from a high of 64 in 2000.

Since 2013 Robertson has completed four Criminon courses, including an addiction counseling course and a course on moral conduct. In 2015 Robertson completed Step 1 of the Step Down Program, a rehabilitative program offered by the CDCR to prepare inmates for return to the general prison population.

Robertson has been accepted to residential reentry programs administered by the Amity Foundation and the Weingart Center upon his release. His sister has also agreed to take him in. However, Robertson told his expert, Dr. Hy Malinek, he has not maintained contact with anyone in his family but would "consider" living with his sister.

d. *Expert testimony*

The People called two experts during the suitability hearing, Special Agent Halualani and Lowell Smith. Halualani has been an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives for more than 28 years; since 1996 he has spent the majority of his time investigating the Aryan Brotherhood. Halualani testified regarding the structure and practices of the Aryan Brotherhood. According to Halualani, only an Aryan Brotherhood member is permitted to kill another member. Because Robertson was ordered to murder another member in 1995, Halualani concluded Robertson is a member of the Aryan

Brotherhood. Halualani believes Robertson continues to be a member of the Aryan Brotherhood because he has not taken any steps to debrief, that is, formally renounce the gang and inform law enforcement of all known gang activity, which is the only way (other than death) to leave the Aryan Brotherhood. Further, Halualani stated absence of violent acts by an individual did not mean he was not an active member of the Aryan Brotherhood because members often solicited younger associates to commit crimes and violent acts. Halualani testified he believes Robertson is at risk to commit solicitation of murder, attempted murder or murder/kidnapping if released from prison because Aryan Brotherhood members are expected to remain loyal to the gang and commit criminal acts on its behalf once released. Based on these factors, Halualani opined Robertson would pose an unreasonable risk to public safety if released from prison.

The People's second expert witness, Lowell Smith, is a former Orange County probation officer who has worked specifically with white supremacist gang members since 1999. Smith testified approximately 95 percent of the white supremacist gang members he supervised returned to using drugs after their release from prison. Smith concurred with Halualani's analysis of the practices of the Aryan Brotherhood. Smith also testified he believes Robertson is an active associate of the Aryan Brotherhood based on his failure to debrief. Smith stated that, if released from prison, Robertson would be obligated to follow Aryan Brotherhood orders, including soliciting murder and other violent crimes. Thus, Smith concluded Robertson would pose an unreasonable risk to public safety if released.

Robertson presented two experts at the hearing, Richard J. Subia and Dr. Malinek. Subia is a retired prison warden and

correctional administrator, who spent 26 years working for the CDCR. In his written report Subia stated "it is clear that over the years during [Robertson's] incarceration he has been active in the gang lifestyle." As to Robertson's prior prison terms Subia stated Robertson "was actively involved in criminal gang activity and was routinely involved in serious and violent behavior." However, Subia opined there "is nothing present in [Robertson's] current commitment history to indicate that he has carried out any criminal activity for the [Aryan Brotherhood]. . . . [T]here is no information present to indicate that [Robertson] has been involved in any specific illegal or violent incident as a member or associate of the gang over the past 16 years." Subia credited Robertson's account that the food tray incident in 2012 was a "passive protest" and not gang related. Subia testified that, pursuant to a CDCR change in policy in 2013, he does not believe Robertson would currently be validated as a gang member based on the 2012 incident. In sum, Subia opined Robertson was no longer involved with the Aryan Brotherhood and did not pose an unreasonable risk of danger to public safety.

Dr. Malinek is a clinical forensic psychologist with experience conducting risk assessments. Dr. Malinek interviewed Robertson in 2015 and administered a series of psychological tests and risk assessment measures. Dr. Malinek stated Robertson's antisocial traits had weakened with age, as demonstrated by the fact that he had incurred no rules violations in two years and had not exhibited violent behavior in 16 years. However, Dr. Malinek stated Robertson had minimized his criminal history and demonstrated limited insight, poor judgment and poor impulse control. Dr. Malinek acknowledged Robertson's plans for release were "not solidified in regards to

living situation and income." Dr. Malinek also testified he believed Robertson was an associate of the Aryan Brotherhood based on what he had read in Robertson's file. Regardless, Dr. Malinek concluded Robertson's risk of danger to society was "probably no more than moderate." However, when considering only his risk of committing a violent offense, Robertson's risk of danger to the community was low, so long as he attended a transitional program for one year and was "tightly monitored."

4. *The Trial Court's Ruling*

On February 11, 2016, in a 20-page memorandum of decision, the trial court denied Robertson's petition under Proposition 47. Robertson filed a notice of appeal on March 4, 2016. On April 20, 2016, the trial court issued a second order substantively identical to the first, except explicitly stating it was also denying Robertson's petition under Proposition 36. Robertson filed a notice of appeal from the second order on June 1, 2016. The two appeals were consolidated.

Pursuant to section 1170.18, subdivision (b), the trial court considered and made findings on Robertson's criminal history, disciplinary and rehabilitation record while incarcerated and other relevant evidence, including Robertson's classification score, gang involvement, post-release plans and the opinions of the proffered experts. The court noted Robertson's lengthy criminal history and his history of committing crimes even while on parole. While acknowledging Robertson had never caused injuries to his victims, the court pointed out he had used weapons to carry out each felony. In addition, the court found the fact that Robertson's most recent conviction was almost 20 years ago was not dispositive because Robertson has not been free from custody or parole since 1978.

Regarding gang membership the trial court emphasized Robertson had admitted his association with the Aryan Brotherhood to Halualani in 1996 and had been continually validated as an active associate since 1992. The evidence also showed Robertson had held contraband for a gang member and had been ordered to murder another gang member. As to why Robertson never committed the ordered murder, the court observed that Robertson had been continually in and out of custody during the three years after the order was given and his current incarceration began. Thus, the court reasoned it was possible Robertson was "never out of custody long enough to plan and carry out the homicide." The court was likewise not persuaded by Robertson's insistence that the 2012 food tray incident was a protest rather than gang activity. The court pointed out Robertson did not say he had been engaging in a protest at the time of the rules violation hearing or during any subsequent review of his gang association. Robertson's failure to debrief further persuaded the court he did not intend to permanently dissociate with the Aryan Brotherhood and would be at risk of committing crimes on behalf of the gang if released.

Finally, the court found Robertson's rehabilitative efforts and post-release plans to be insufficient. While the court praised Robertson's completion of step 1 of the Step Down Program, it stated he would need more extensive participation in substance abuse programming given that many of his previous offenses were fueled by his drug use. The court also noted Malinek believed Robertson's release would pose a low risk of danger only if kept in a tightly controlled environment. However, the post-release programs to which Robertson had been accepted were voluntary, and he would be free to leave at any time.

In sum, the court concluded that, "although [Robertson's] criminal history is remote, his continued gang membership and insufficient rehabilitative programming indicate that his criminal history remains probative of his current risk of danger to public safety." Further, the positive factors of Robertson's age and acceptance into a residential program were "outweighed by his criminal history and continued association with the Aryan Brotherhood." In light of these factors, the trial court found "the totality of the evidence contained in the record demonstrates that resentencing [Robertson] would pose an unreasonable risk of danger to public safety" pursuant to both Proposition 36 and Proposition 47.

DISCUSSION

1. *Governing Law*

As discussed, Proposition 36 was intended to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime" and to permit "repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 6.) As part of its goal of limiting indeterminate life sentences to serious or violent felony offenders, Proposition 36 added section 1170.126, which permits inmates previously sentenced to life terms under an earlier version of the three strikes law to petition to recall their sentences and, if eligible for relief, to be resentenced to the term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).) Even if the

petitioner is otherwise entitled to be resentenced under the new three strikes law, however, the petition may be denied if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Proposition 47, passed by the voters in November 2014 as part of the Safe Neighborhoods and Schools Act (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 14), was designed to reduce the punishment for certain drug and theft offenses by reclassifying them from felonies to misdemeanors. Like Proposition 36, Proposition 47 creates a post-conviction procedure by which a person currently serving a sentence for a specifically identified drug or theft crime may petition for resentencing under the new law. If a Proposition 47 petitioner meets certain eligibility requirements, he or she must be 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." (§ 1170.18, subd. (b).)

Under Proposition 36 the court has broad discretion in determining whether an inmate poses a danger to public safety. In making this determination, the court "may consider" the petitioner's criminal conviction history, disciplinary record and record of rehabilitation and "any other evidence" the court determines to be relevant to the question whether imposing a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g)(1)-(3).)

Under Proposition 47 the scope of the court's discretion to determine whether an inmate otherwise eligible for resentencing poses an unreasonable danger to public safety appears more

limited: "'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, subdivision (e)(2)(C)(iv). (§ 1170.18, subd. (c).) Those violent felony offenses include homicide offenses, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death."[9] These violent felony offenses are commonly known as "super strikes." (See *People v. Hall* (2016) 247 Cal.App.4th 1255, 1262, fn. 6.)[10] As with Proposition 36, Proposition 47 states that in determining whether an inmate poses a danger to public safety, the trial court "may consider" the petitioner's criminal conviction history, disciplinary record and record of rehabilitation and "any other evidence" the court determines to be relevant. (§ 1170.18, subd. (b)(1)-(3).)

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[9] Section 667, subdivision (e)(2)(C)(iv), also includes sexually violent offenses and certain sexual offenses against children including oral copulation, sodomy, sexual penetration and lewd or lascivious conduct.

[10] The issue whether Proposition 47's definition of "unreasonable risk of danger to public safety" (§ 1170.18, subd. (c)) applies to resentencing under Proposition 36 (§ 1170.12, subd. (f)) is currently pending before the Supreme Court. (*People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.) *Valencia* was argued and submitted on April 4, 2017.

2. *The People Were Not Required To Prove Robertson's Dangerousness Under Proposition 36 to a Jury Beyond a Reasonable Doubt*

Robertson contends he had the right to a jury determination whether his resentencing would pose an unreasonable risk of danger to public safety under Proposition 36 and the proper standard of proof was "beyond a reasonable doubt." Robertson relies on the principle that, "'under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.'" (*People v. Towne* (2008) 44 Cal.4th 63, 74; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) Robertson argues that, once a court finds a petitioner eligible for resentencing, there is "a presumption created that he would be resentenced" unless he is found to be an unreasonable risk of danger to public safety. Thus, Robertson continues, upon a finding he was eligible for resentencing, a presumption of a reduced sentence arose and the dangerousness finding exposed him to a greater potential sentence, thus triggering his Sixth Amendment right to a jury trial and a requirement of proof beyond a reasonable doubt.

Robertson's interpretation of Proposition 36 has been repeatedly rejected by California appellate courts. There is no support in the statutory language or case law for Robertson's position that eligibility for resentencing automatically entitles the petitioner to a recall of his or her sentence. To the contrary, the statute plainly states, once the court determines the petitioner satisfies the criteria for eligibility, the petitioner "shall be resentenced . . . *unless* the court, in its discretion, determines

that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f), italics added.) Thus, a finding of dangerousness "is not a factor which enhances the sentence imposed when a defendant is resentenced under [Proposition 36]; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1303 (*Kaulick*).) In addition, because Proposition 36 "only allow[s] the defendant's original sentence to be modified downward, not upward, any facts found in a proceeding under [Proposition 36], including the defendant's dangerousness, do not implicate the defendant's Sixth Amendment rights." (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 241.) Accordingly, Robertson did not have a right to a jury trial on the issue of dangerousness. (See *Kaulick*, at pp. 1301-1305 [no right to jury trial on issue of dangerousness under Proposition 36]; see also *Jefferson*, at pp. 240-241 [no right to jury trial on issue of dangerousness under Proposition 47]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 451-452 [no right to jury trial on value of property stolen under Proposition 47].)

Further, the proper burden of proof to establish dangerousness under Proposition 36 is preponderance of the evidence, not beyond a reasonable doubt as Robertson contends. Evidence Code section 115 states: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Here, Proposition 36 does not explicitly provide for

a higher burden of proof, and Robertson has not cited any statutory or case authority requiring proof beyond a reasonable doubt. Accordingly, we apply the general rule as articulated in the Evidence Code. (See *Kaulick*, *supra*, 215 Cal.App.4th at p. 1305 ["we conclude the proper standard of proof [for finding dangerousness under Proposition 36] is preponderance of the evidence"]; see also *People v. Jefferson, supra,* 1 Cal.App.5th at p. 241 ["the proper standard of proof on a dangerousness finding [under Proposition 47] is the default standard of proof by a preponderance of the evidence"].)

Robertson's reliance on *People v. Arevalo* (2016) 244 Cal.App.4th 836, is misplaced. In *Arevalo* the trial court denied Arevalo's petition for resentencing based on a finding he was ineligible under section 1170.126, subdivision (e), because he had committed the disqualifying conduct of being armed with a weapon during his current offense. The court applied a preponderance of the evidence standard in making this finding. Arevalo argued the court should have applied a beyond a reasonable doubt standard. Notably, in the initial bench trial on the underlying charges, the court had found Arevalo not guilty of possession of a firearm and found the "armed with a firearm" allegation to be not true. Thus, in ruling on eligibility under Proposition 36, the court made a finding in direct contradiction to the court that had originally tried the case.

On appeal the same court that had decided *Kaulick* held the resentencing court had incorrectly applied the preponderance of the evidence standard. It held instead the appropriate standard of proof at the eligibility stage of a Proposition 36 hearing is beyond a reasonable doubt. The court stated, "Under a lesser standard of proof, nothing would prevent the trial court

from disqualifying a defendant from resentencing eligibility consideration by completely revisiting an earlier trial, and turning acquittals and not-true enhancement findings into their opposites." (*People v. Arevalo*, *supra*, 244 Cal.App.4th at p. 853.) However, the court explicitly distinguished this holding from its holding in *Kaulick*, which it reiterated held that at the suitability stage of a Proposition 36 hearing, "the People bear the burden of establishing dangerousness by a preponderance of the evidence." (*Arevalo*, at p. 842, fn. 3.) Robertson's argument ignores this distinction between eligibility and dangerousness in *Arevalo*. He has cited no authority supporting the application of a higher standard of proof at the suitability stage.[11]

3. *The Trial Court Did Not Abuse Its Discretion in Denying Robertson's Proposition 36 and Proposition 47 Petitions*

a. *Standard of review*

Both section 1170.126, subdivisions (f) and (g), and section 1170.18, subdivision (b), repeatedly refer to the trial court's discretion in determining whether a petitioner poses an unreasonable risk of danger to public safety. Pursuant to this clear statutory grant of discretion, we review the trial court's denial of Robertson's petitions for abuse of discretion. (See *People v. Jefferson*, *supra*, 1 Cal.App.5th at p. 242 [reviewing Proposition 47 dangerousness finding for abuse of discretion]; *People v. Hall*, *supra,* 247 Cal.App.4th at p. 1264 [same];

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[11] Robertson likewise ignores the conflict among the courts of appeal on the issue of the standard of proof to be applied at eligibility hearings under Proposition 36. The issue is currently pending before the Supreme Court. (*People v. Frierson* (2016) 1 Cal.App.5th 788, review granted Oct. 19, 2016, S236728.)

cf. *People v. Sapp* (2003) 31 Cal.4th 240, 257-258 [applying abuse of discretion standard when statute authorizes court to act in its discretion]; *People v. Daniels* (2009) 176 Cal.App.4th 304, 320 [same].) "'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.] ""[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary."'" (*People v. Hall*, *supra,* 247 Cal.App.4th at p. 1264.)

b. *The trial court did not abuse its discretion in finding Robertson posed an unreasonable risk of danger to public safety under Proposition 47*

In making its dangerousness determination the trial court considered the factors identified in section 1170.18, subdivision (b), and made findings as to each one. The court relied on the fact that Robertson had used a dangerous weapon when committing each felony for which he was convicted and had refused to obey the law even when on parole or probation. The court considered that Robertson's crimes were remote in time, but balanced that fact against Robertson's history of reoffending when on parole, his gang affiliation, failure to participate in rehabilitative programming and insufficient post-release plans.

As to Robertson's gang affiliation the trial court heard testimony from experts that Robertson was currently an Aryan Brotherhood member and would be expected to commit violent crimes for the gang upon his release from prison. The trial court also considered that Robertson had admitted his association with

the Aryan Brotherhood in 1996, had been continually validated by CDCR as a gang member since 1992, had not formally severed ties with the gang by debriefing and had twice been cited for gang activity. Based on the totality of this evidence, the trial court concluded Robertson presented "an unreasonable risk of committing the kinds of crimes his gang typically inflicts upon the community," which included "super strikes such as kidnapping, solicitation for murder, attempted murder, and first degree murder."

Robertson argues the trial court's finding he was an Aryan Brotherhood member "rested on slight, and somewhat dubious, evidence." This, however, was an argument for the trial court. In applying an abuse of discretion standard, it is not our place to second-guess the factual findings of the trial court or reweigh the evidence. (*People v. Jordan* (1986) 42 Cal.3d 308, 317 [Court of Appeal erred when it reweighed evidence "rather than limiting its review to whether the sentencing court abused its statutory discretion"]; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067 [when reviewing for abuse of discretion, appellate court resolves evidentiary conflicts in light most favorable to trial court's ruling].)

Likewise, Robertson's contention he does not pose an unreasonable risk of danger to public safety because of his age and impaired mobility is essentially an argument the trial court did not accord these factors the weight he believes they deserve. The trial court explicitly considered those factors but concluded they did not overcome the evidence of Robertson's dangerousness. That finding was well within the trial court's discretion. For example, while Robertson's age and use of a cane might inhibit his ability to personally carry out a super strike such as a murder

or attempted murder, those factors would have no impact on his ability to solicit a murder or aid and abet a murder or attempted murder.

Based on the evidence presented, the trial court could reasonably conclude Robertson presented an unreasonable risk of danger to public safety and was a risk to commit a "super strike" offense enumerated in section 667, subdivision (e)(2)(C)(iv). The court applied the correct standard and expressly considered each enumerated factor. There is no basis for reversing the court's order denying Robertson's petition under Proposition 47.

c. *The trial court did not abuse its discretion in finding Robertson posed an unreasonable risk of danger to public safety under Proposition 36*

As discussed, on its face the scope of the trial court's discretion to determine whether an inmate poses an unreasonable risk of danger to public safety under Proposition 36 is broader than its discretion under Proposition 47. Specifically, section 1170.126 does not require a finding that the inmate is at risk of committing a super strike. Even if we were to apply Proposition 47's narrower definition of unreasonable risk of danger to public safety to Robertson's Proposition 36 petition—the issue before the Supreme Court in *People v. Valencia*, S223825—because the trial court did not abuse its discretion in finding dangerousness under the Proposition 47 standard, we are compelled to find the trial court did not abuse its discretion in finding Robertson was an unreasonable risk of danger to public safety under Proposition 36.

4. *Proposition 47 Does Not Violate a Petitioner's Right to Equal Protection of the Law*

Robertson contends Proposition 47 violates the federal and state constitutions' guarantee of equal protection to individuals currently serving a felony sentence for a crime that has been reclassified as a misdemeanor under the proposition.[12] Specifically, Robertson argues inmates currently serving a felony sentence who seek resentencing under Proposition 47, such as Robertson himself, are subject to the trial court's discretion not to resentence them based on a finding that resentencing would pose an unreasonable risk of danger to public safety. In contrast, individuals who committed the same offense but have already completed their sentences are not subject to a dangerousness inquiry prior to redesignation of their offenses (§ 1170.18, subds. (f)-(h)), nor are defendants who committed the same offense and were/are sentenced after the enactment of Proposition 47 (see, e.g., Health & Saf. Code, § 11350). Robertson contends these three groups are similarly situated and their differential treatment does not pass the strict scrutiny or rational basis tests.

To prevail on an equal protection challenge, a party must first establish 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

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[12] Robertson raises this argument for the first time on appeal. While failure to raise an argument in the trial court might normally result in its forfeiture, this court has discretion to consider issues of constitutional significance involving pure questions of law presented for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 & fn. 7.)

are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "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.)

The three groups of individuals identified by Robertson are not similarly situated. Unlike an individual who is convicted and sentenced after the adoption of Proposition 47, Robertson committed a crime defined at the relevant time as a felony, not a misdemeanor. He has been under the supervision and jurisdiction of the CDCR pursuant to a sentence properly imposed under the law in effect when he was sentenced. Simply put, Robertson was never subject to a misdemeanor sentence, and the newly convicted defendant is not subject to a felony sentence as Robertson was. The two groups are not the same.

In addition, even if we were to assume these two groups of offenders are similarly situated, we would review the classification only for rationality because it is not based upon membership in any suspect class and because laws that draw distinctions in criminal cases do not, except when demarking "the boundaries between the adult and juvenile criminal justice systems," implicate a fundamental right. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-838.)[13] We can easily hypothesize at

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[13] Unless two similarly situated groups are defined by word or effect as members of a "suspect class" (such as race, national origin, gender or illegitimacy, to name a few) or the law affects a fundamental right, a law will be upheld as long as there is any

least two reasons why the electorate would require a determination of future dangerousness before permitting the resentencing of individuals currently serving a felony prison sentence for what is now a Proposition 47 offense. First, the voters could have reclassified certain offenses from felonies or wobblers to misdemeanors and made that change entirely prospective. (Cf. *People v. Floyd* (2003) 31 Cal.4th 179, 188 [rejecting claim that "an equal protection violation aris[es] from the timing of the effective date of a statute lessening the punishment for a particular offense"].) Conditioning retroactivity of the reclassification on an assurance the public's safety will not be jeopardized is certainly reasonable. (Cf. *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 [[R}ationale basis review "'does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated.'"].) In addition, given the realities of plea bargaining, an inmate serving a felony sentence for what is now a Proposition 47 offense may well have been charged with more serious offenses and negotiated a resolution of those criminal charges by agreeing to a felony sentence for less serious drug or theft-related crimes. Before redesignating those offenses a misdemeanor for a particular petitioning inmate, it is rational to require the trial

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"""rational relationship between the disparity of treatment and some legitimate governmental purpose,""" even if the rational basis for that law was never articulated by—or even relied on by—the Legislature. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881; cf. *People v. Wilkinson*, *supra*, 33 Cal.4th at p. 836 [for laws drawing distinctions based on membership in a suspect class or affecting a fundamental right, courts will apply "strict" or "intermediate" scrutiny].)

court to evaluate whether he or she poses a serious danger to the public.

Likewise, an inmate currently serving a felony sentence is not similarly situated to a petitioner who has completed his or her felony sentence. The former seeks not only redesignation of the Proposition 47 offense but also a reduction in his or her term of imprisonment; the latter requests only the redesignation. The issue of danger to the public is simply not relevant to the petition filed by an individual who has completed his or her sentence. (See *People v. Losa* (2014) 232 Cal.App.4th 789, 793 [currently serving petitioner under Proposition 36 not similarly situated to newly sentenced individuals or petitioners who have completed their sentences].)

DISPOSITION

The orders are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.