# PROPOSITION 47

## "The Safe Neighborhoods and Schools Act"

**J. RICHARD COUZENS**
Judge of the Superior Court
County of Placer (Ret.)

**TRICIA A. BIGELOW**
Presiding Justice, Court of Appeal, 2nd Appellate District, Div. 8 (Ret.)

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## I. Introduction

On November 4, 2014, voters enacted Proposition 47, "The Safe Neighborhoods and Schools Act." (See Appendix I for the full text of Proposition 47.) Proposition 47 intends to "ensure that prison spending is focused on violent and serious offenses, maximize alternatives for nonserious, nonviolent crime, and invest the savings generated from" the new act to support elementary and high school programs, victim's services, and mental health and drug treatment. The initiative seeks to accomplish these goals through four main strategies: (1) reducing most possessory drug offenses and thefts of property valued under $950 to straight misdemeanors; (2) creating a process for persons currently serving a felony sentence for theft and drug offenses to petition the court for resentencing as a misdemeanor; (3) creating a process for persons who have completed qualified felony sentences to apply to the court for reclassification of the crime as a misdemeanor; and (4) forming a Safe Neighborhoods and Schools Fund generated by the savings achieved by the change in the sentencing laws.[1]

The purpose of this memorandum is to discuss the issues of interpretation and implementation raised by the initiative.

### *A. Application of the law related to Proposition 36*

As a matter of general observation, the basic structure of Proposition 47 is strikingly similar to Proposition 36, "The Three Strikes Reform Act of 2012," enacted on November 6, 2012. Both initiatives contain a reduction in penalty for certain crimes and a resentencing process for people who would be entitled to lesser punishment had the crime been committed after the enactment of the new law. The resentencing provisions of Proposition 47 are codified in Penal Code, section 1170.18.[2] Some of the statutory language is taken directly from section 1170.126, the resentencing provisions of Proposition 36. Accordingly, much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47. It should be emphasized, however, that until appellate courts weigh in on the specifics of Proposition 47, much will be left to the trial courts and counsel to fashion practical solutions to the anticipated additional workload.

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[1] A discussion of the Safe Neighborhoods and Schools Fund is beyond the scope of this analysis.

[2] Unless otherwise indicated, all statutory references are to the Penal Code.

## II. Effective Date

### *A. Effective date, generally*

Since Proposition 47 does not designate a specific effective date, it became effective on November 5, 2014, the day after the election. "An initiative statute or referendum approved by a majority of the votes thereon takes effect the day after the election unless the measure provides otherwise." (Calif. Const., Art. 2, § 10(a).) Clearly the new law will apply to all crimes committed on or after November 5th. The issue is the extent to which it applies to crimes committed prior to the effective date.

### *B. Application of the rule of* Estrada

Whether the reduced penalty provisions of Proposition 47 are applied retroactively to crimes committed prior to November 5th depends on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740.

*Estrada* teaches that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, at p. 745.)

*People v. DeHoyos* (2018) 4 Cal.5th 594, holds *Estrada* has no application to cases arising under Proposition 47. The court noted the initiative did not contain an express savings clause, which would have designated a particular effective date. As observed by *DeHoyos* at pages 601-603:"In the decades since *Estrada* was decided, we have clarified that the absence of an express savings clause does not necessarily resolve the question whether a lawmaking body intended a statute reducing punishment to apply retrospectively. '[W]hile such express statements unquestionably suffice to override the *Estrada* presumption,' we have explained, 'the "absence of an express saving clause ... does not end 'our quest for legislative intent.' " ' [Citations.] This is because '[o]ur cases do not "dictate to legislative drafters the forms in which laws must be written" to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require "that the [legislative body] demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." ' (*Conley*, *supra*, 63 Cal.4th at pp. 656–657, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting *In re Pedro T.*, *supra*, 8 Cal.4th at pp. 1048–1049, 36 Cal.Rptr.2d 74, 884 P.2d 1022.)

"Proposition 47 contains no express savings clause. It does, however, address the question of retrospective application in conspicuous detail. Separate provisions articulate the conditions under which the new misdemeanor penalty provisions apply to completed sentences (§ 1170.18, subds. (f)-(j) ), sentences still being served (*id.*, subds. (a)-(e) ), and sentences yet to be imposed (Pen. Code, §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (a); Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a) ). The question is whether these provisions sufficiently demonstrate the electorate's intent concerning whether defendants who were sentenced before Proposition 47's effective date, but whose judgments were not yet final, are entitled to automatic resentencing, or must instead petition for resentencing under section 1170.18.

"We considered a similar question in *Conley*, *supra*, 63 Cal.4th 646, 203 Cal.Rptr.3d 622, 373 P.3d 435. That case concerned the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012); hereafter Reform Act), which prospectively ameliorated sentencing under the statutes collectively known as the 'Three Strikes' law. (Pen. Code, §§ 667, subds. (b)-(j), 1170.12.) The Reform Act also offered a possibility of resentencing to third strike prisoners who were currently serving indeterminate life terms for offenses that, if committed after the Act's effective date, would no longer support life terms. The Act's resentencing provision, Penal Code section 1170.126, permitted '[a]ny person serving an indeterminate term of life imprisonment ... [to] file a petition for a recall of sentence ... [and] to request resentencing in accordance with' the new, ameliorated penalty provisions. (*Id.*, subd. (b).) This statute, like Proposition 47's resentencing provision (§ 1170.18), also conditioned relief on the court's determination whether resentencing 'would pose an unreasonable risk of danger to public safety.' (Pen. Code, § 1170.126, subd. (f).) [Footnote omitted.]

"The issue in *Conley*, *supra*, 63 Cal.4th 646, 203 Cal.Rptr.3d 622, 373 P.3d 435, was whether life prisoners whose judgments were not final on the Reform Act's effective date could obtain relief only under the Act's resentencing provision (Pen. Code, § 1170.126), or whether they were entitled to be resentenced automatically because of the *Estrada* presumption that laws ameliorating punishment apply to nonfinal sentences. We concluded that the resentencing provision was the exclusive avenue for resentencing of persons who had been sentenced before Proposition 36's effective date. Three considerations led us to this conclusion.

"First, we explained, 'unlike the statute at issue in *Estrada*, *supra*, 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948], the Reform Act [was] not silent on the question of retroactivity. Rather, the Act expressly addresse[d] the question in [its resentencing provision], the sole purpose of which is to extend the benefits of the Act retroactively.' (*Conley*, *supra*, 63 Cal.4th at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435; see Pen. Code, § 1170.126.) That provision, we noted, 'dr[ew] no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of

prisoners to petition courts for recall of sentence under the Act.' (*Conley*, *supra*, at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Moreover, we explained, 'the nature of the [Reform Act's] recall mechanism and the substantive limitations it contains call[ed] into question the central premise underlying the *Estrada* presumption,' namely, that the lawmaking body had 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' (*Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting *In re Pedro T.*, *supra*, 8 Cal.4th at p. 1045, 36 Cal.Rptr.2d 74, 884 P.2d 1022.) We emphasized that, instead of mandating lesser punishment in all cases, voters had conditioned relief on a judicial assessment of the risk that resentencing would pose to public safety. (Pen. Code, § 1170.126, subd. (f); see *Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Finally, we noted, our understanding of the recall mechanism was reinforced by consideration of the remainder of the statutory scheme. We noted the sentencing provisions of the Reform Act had established a new set of factors related to the nature of the defendant's current offense that must be ' "plead[ed] and prov[ed]" by the prosecution.' (*Conley*, at p. 659, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting Pen. Code, § 1170.12, subd. (c)(2)(C).) The Reform Act did not, however, specify how that requirement was to be satisfied in the case of a defendant who had already been sentenced. This omission, we concluded, reinforced the conclusion that voters had not contemplated that previously sentenced defendants would be resentenced automatically under these new sentencing procedures, but instead contemplated that such defendants would seek relief under the Reform Act's resentencing provision, which contained no comparable pleading-and-proof requirements. (*Conley*, at pp. 660–661, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

"Similar considerations lead us to a similar conclusion in this case. Like the Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively. (*Conley*, *supra*, 63 Cal.4th at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. (§ 1170.18, subd. (a).) Like the parallel resentencing provision of the Reform Act, section 1170.18 draws no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence. (*Ibid*.) And like the resentencing provision of the Reform Act, section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters "categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' (*Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435; see § 1170.18, subd. (b).)

"Proposition 47, unlike the Reform Act, does not create new sentencing factors that the prosecution must 'plead[ ] and prove[ ]' (Pen. Code, § 1170.12, subd. (c)(2)(C) ) to preclude a grant of leniency. We can therefore draw no inferences from the omission of

any provision addressing the application of such a pleading-and-proof requirement to individuals who have already been sentenced, as we did in *Conley*. But our conclusion is strongly reinforced by other indicia of legislative intent. In enacting Proposition 47, voters declared their purpose to '[r]equire a thorough review of criminal history and risk assessment of *any individuals* before resentencing to ensure that they do not pose a risk to public safety.' (Voter Information Guide, *supra*, text of Prop. 47, § 3(5), p. 70, italics added.) The breadth of this statement of purpose indicates an intent to apply the provisions of section 1170.18, including its risk assessment provision, to all previously sentenced defendants who had not yet completed their sentences, and not just to those whose judgments had become final on direct review. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1280, 14 Cal.Rptr.3d 1, 90 P.3d 1168 [courts may consider 'statements of the intent of the enacting body contained in a preamble' as an 'aid in construing a statute'].)" Generally in accord with *DeHoyos* is *People v. Shabazz* (2015) 237 Cal.App.4th 303 (*Shabazz*).

**Crime committed prior to effective date, defendant convicted or sentenced after effective date**

*People v. Lara* (2019) 6 Cal.5th 1128 (Lara) addresses the circumstance where the defendant commits the criminal offense prior to November 5, 2014 but is convicted or sentenced after that date. Such defendants are entitled to sentencing under the new law without being required to request resentencing. "In People v. DeHoyos (2018) 4 Cal.5th 594, 600–603, 229 Cal.Rptr.3d 687, 412 P.3d 368 (DeHoyos), we concluded that section 1170.18 supplies the exclusive path to relief on a current offense under Proposition 47 for defendants who were serving felony sentences as of the measure's effective date, including those whose judgments were on appeal and thus not yet final. The question now before us concerns the application of Proposition 47 to defendants who committed their crimes before the measure's effective date but who were tried or sentenced after that date. Our answer follows directly from DeHoyos: Defendants who had not yet been sentenced as of Proposition 47's effective date are entitled to initial sentencing under Proposition 47's amended penalty provisions, without regard to the resentencing procedures applicable to those who were already serving their sentences." (*Lara*, at p. 1131.)

**Summary of sentencing rules**

Consistent with the decisions in *DeHoyos*, *Shabazz*, and *Lara*, the following sentencing rules will apply to persons sentenced under the new initiative:

- If the case has been sentenced prior to November 5, 2014, any request for sentencing as a misdemeanor must occur through a petition for resentencing under section 1170.18, even though the conviction is not final. Under such circumstances, Proposition 47, like Proposition 36, grants the trial court

discretion to deny resentencing where to do so would pose an unreasonable risk of danger to public safety.

- If the crime is committed prior to November 5, 2014, but the defendant is convicted or sentenced after that date, the new sentencing rules will apply to the case. This means that all persons charged with qualified crimes that have not been convicted or sentenced as of November 5th will be entitled to misdemeanor treatment without the need to request any kind of a resentencing under section 1170.18.

- If the crime is committed on or after November 5, 2014, the new sentencing rules apply to the case.

## III. Exclusion From the Benefits of Proposition 47

The benefits of reduced punishment and the ability to request resentencing or reclassification established by Proposition 47 are expressly denied persons with prior convictions for designated violent offenses, or, in most cases, for a crime which requires registration as a sex offender. Some of the statutory exclusions are the same as those in Proposition 36, but they are far fewer in number. **The exclusions apply irrespective of any consideration of dangerousness.** If the defendant has suffered any of the designated prior convictions, he will be subject to the traditional punishment for these offenses and may not request resentencing or reclassification of an otherwise Proposition 47-eligible crime.

The burden of proof for an exclusion from the benefits of Proposition 47 is on the People by a preponderance of the evidence. (See *People v. Osuna* (2015) 225 Cal.App.4th 1020, 1040 [Proposition 36 case].)

The disqualifying prior convictions are referenced in each statute amended or added by the initiative. (See, *e.g.*, § 476a(b), issuing checks with insufficient funds.) The specific disqualifying convictions are listed in section 667(e)(2)(C)(iv). As noted, the initiative also disqualifies anyone who is convicted of a crime requiring registration as a sex offender under section 290(c).

The meaning of the phrase "prior conviction" likely will depend on the context of its application. If the defendant is facing prosecution for a new Proposition 47-eligible offense, the disqualifying conviction of a violent felony or crime requiring registration as a sex offender under section 290(c) must occur *prior* to the crime at issue in the case. Proposition 47 clearly specifies that a person is disqualified only "if that person has one or more *prior convictions* for an offense specified in" section 667(e)(2)(C)(iv) "or for an offense requiring registration pursuant to" section 290(c). (See, *e.g.*, § 473; italics added.) Accordingly, if the disqualifying conviction occurs contemporaneously with the

crime at issue, the person is not disqualified from the benefits of Proposition 47 as to the current conviction.

If the defendant is requesting a resentencing or reclassification of a Proposition 47-eligible offense, however, "prior conviction" means the disqualifier was acquired at *any time* prior to the filing of the petition or application for relief, not just prior to the crime at issue. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179; *People v. Montgomery* (2016) 247 Cal.App.4th 1385; *People v. Walker* (2016) 5 Cal.App.5th 872 [a defendant will be disqualified if the disqualifying conviction occurs prior to sentencing]; *People v. Casillas* (2017) 13 Cal.App.5th 745, 750 [a defendant will be disqualified if the disqualifying conviction occurs prior to ruling on motion to reduce offense to a misdemeanor].) It is of no consequence that the conviction of the prior disqualifying offense is not final as of the ruling on the motion. (*Casillas*, *supra*, at p. 755.)[3]

**Crimes listed in section 667(e)(2)(C)(iv)**

For a table of the crimes listed in section 667(e)(2)(C)(iv), see Appendix II.

A prior conviction of any of the following "serious" or "violent" felonies, now commonly referred to as "super strikes," will disqualify a person from receiving any benefit from the changes brought by Proposition 47:

**(a) A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) [Sexually Violent Predator Law]**: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

Although Proposition 47 makes reference to the list of crimes that may trigger the application of the Sexually Violent Predator Law in Welfare and Institutions Code section 6600(b), nothing in the initiative suggests the defendant must have been *adjudicated* as a sexually violent predator to be disqualified.

[3] The rule is different for requests for resentencing under Proposition 36. There the disqualifying conviction must occur prior to the crime at issue. (*People v. Spiller* (2016) 2 Cal.App.5th 1014, 1022.)

Since *attempted* forcible oral copulation is not listed in Welfare and Institutions Code, section 6600(b), conviction of that offense, in itself, likely will not bar a defendant from relief. (See *People v. Jernigan* (2014) 227 Cal.App.4th 1198 [a Proposition 36 case interpreting section 1170.126].) A review of the entire record of conviction, however, may disclose facts that will cause the crime to fall within the purview of the SVP law and result in the exclusion of the defendant. (*Id*., at pp. 1208-1209.)

**(b) Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.**

**(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.**

**(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive.** Convictions for voluntary manslaughter under section 192(a), involuntary manslaughter under section 192(b), and vehicular manslaughter under section 192(c) will not exclude the defendant from the benefits of the new law.

**(e) Solicitation to commit murder as defined in section 653f.**

**(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).**

**(g) Possession of a weapon of mass destruction, as defined in section 11418(a)(1).**

**(h) Any serious or violent offense punishable in California by life imprisonment or death.**

Persons convicted of a crime with a base term punishment of life in prison will be excluded from the benefits of Proposition 47. There is an issue, however, whether a defendant who has been convicted of a base term that does not provide a life term, but which becomes a life term by virtue of an enhancement or alternative sentencing scheme, is considered to have been convicted of an offense punishable by life imprisonment. *People v. Hernandez* (2017) 10 Cal.App.5th 192, holds that subdivision (h) does not apply if the life term is imposed as a result of a recidivist statute such as the Three Strikes law. In *Hernandez* the defendant was convicted of a robbery, but because of prior serious felony convictions, he received a 25-life sentence under the Three Strikes law.

*Hernandez* did not address the situation where the life term is imposed because of an enhancement. The answer to this issue is found in the interpretation of the phrase "serious or violent offense *punishable in California by life imprisonment*." (Italics

added.) The recent case of *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*), which sets forth a helpful analysis of three California Supreme Court cases, is instructive.

**The *Williams* case**

*Williams* concerned the application of the 10-year gang enhancement under section 186.22(b)(1)(C). That section requires the addition of 10 years to any term imposed for a violent felony committed for the benefit of a street gang under section 186.22(b)(1). Section 186.22(b)(1) "states that '[e]xcept as provided in paragraphs 4 and 5,' the trial court shall impose the gang enhancement. Subdivision (b)(5) provides, in relevant part: '[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15–year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation omitted.]" (*Williams*, *supra*, 227 Cal.App.4th at p. 740; italics in original.)

*Williams* found three Supreme Court cases relevant to the issue. "The first is *People v. Montes* (2003) 31 Cal.4th 350, 352, 2 Cal.Rptr.3d 621, 73 P.3d 489 (*Montes*). In *Montes,* the defendant was convicted of attempted murder with findings that he committed the crime for the benefit of a street gang (§ 186.22, subd. (b)(1)) and that he had personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced him to the 7–year midterm for the attempted murder conviction plus a consecutive 10–year term for the gang enhancement, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.) [¶] The issue was whether 186.22, subdivision (b)(5)'s use of the phrase 'a felony punishable by imprisonment ... for life' applied to the defendant because his felony conviction *coupled with his firearm enhancement* resulted in a life sentence. (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) Based upon its analysis of legislative and voter intent, *Montes* concluded: '[S]ection 186.22(b)(5) applies only where the felony *by its own terms provides for a life sentence.*' (*Ibid.*; italics added.) *Montes* therefore found that the consecutive 10–year term for the gang enhancement had been correctly imposed because the defendant had not been convicted of 'a felony punishable by imprisonment ... for life.' (§ 186.22, subd. (b)(5).) (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 740-741; italics in original; footnote omitted.)

The second case "is *People v. Lopez* (2005) 34 Cal.4th 1002, 22 Cal.Rptr.3d 869, 103 P.3d 270 (*Lopez*). In *Lopez,* the defendant was convicted of first degree murder (§ 187). The punishment for that crime is a term of 25 years to life. (§ 190, subd. (a).) The jury also found that the defendant had committed the murder for the benefit of a street gang (§ 186.22, subd. (b)). The trial court sentenced the defendant, among other things, to 25 years to life in state prison for murder with a consecutive 10–year term for the gang enhancement. (*Id*. at p. 1005, 22 Cal.Rptr.3d 869, 103 P.3d 270.) [¶] The Supreme

Court granted review in *Lopez* to decide whether a defendant convicted of first degree murder with a gang enhancement finding should be subject to a consecutive term of 10 years under section 186.22, subdivision (b)(1)(C) or, instead, the minimum parole eligibility term of 15 years set forth in section 186.22, subdivision (b)(5). [¶] The heart of the dispute was whether the phrase 'punishable by imprisonment ... for life' in section 186.22, subdivision (b)(5) meant 'all life terms (including terms of years to life)' as contended by defendant or, as urged by the Attorney General, meant "merely 'straight' life terms" so that the phrase did not include a sentence for first or second degree murder. (*Lopez, supra,* 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) *Lopez* concluded that the statutory language 'is plain and its meaning unmistakable': 'the Legislature intended section 186.22(b)(5) to encompass both a straight life term as well as a term expressed as years to life ... and therefore intended to exempt those crimes from the 10–year enhancement in subdivision (b)(1)(C). [Citation.]' (*Id*. at pp. 1006–1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) Consequently, *Lopez* directed deletion of the 10–year sentence for the gang enhancement. (*Id*. at p. 1011, 22 Cal.Rptr.3d 869, 103 P.3d 270.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 741-742; footnote omitted.)

The third case is "[*People v. Jones* (2009)] 47 Cal.4th 566, 98 Cal.Rptr.3d 546, 213 P.3d 997. In *Jones,* the defendant was convicted of shooting at an inhabited dwelling, a crime punishable by a sentence of three, five or seven years. (§ 246.) The trial court selected the seven-year term but then imposed a life sentence pursuant to section 186.22, subdivision (b)(4) because the jury had found the defendant committed the crime to benefit a street gang. (*Id*. at p. 571, 98 Cal.Rptr.3d 546, 213 P.3d 997.) In addition, the trial court imposed a consecutive 20–year sentence because the defendant had personally and intentionally discharged a firearm in committing the offense. (§ 12022.53, subd. (c).) (*Id*. at p. 569, 98 Cal.Rptr.3d 546, 213 P.3d 997.) The sentence for that latter enhancement applies to the felonies listed in section 12022.53, subd. (a)(1–16) as well as to '[a]ny felony punishable by ... imprisonment ... for life.' (§ 12022.53, subd. (a)(17).) Shooting at an inhabited dwelling is not one of the listed felonies but the trial court determined that defendant had been convicted of a felony punishable by life imprisonment because of the application of section 186.22, subdivision (b)(4).

"Section 186.22, subdivision (b)(4) provides: 'Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment ... [¶] (B) ... a felony violation of Section 246.' [¶] On appeal, the issue was whether the trial court properly imposed the 20–year sentence enhancement (§ 12022.53) based upon its finding that the defendant had suffered a felony punishable by life. The defense contended that the phrase '[a]ny felony punishable by ... imprisonment ... for life' (§ 12022.53, subd. (a)(17)) should be *narrowly construed* as it was in *Montes* to be limited to a felony which 'by its own terms provides for a life sentence.' (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) In particular, the defendant urged that his life term could

not trigger application of section 12022.53, subdivision (c)'s additional 20–year prison term 'because his sentence of life imprisonment did not result from his conviction of a *felony* (shooting at an inhabited dwelling) but from the application of section 186.22(b)(4), which sets forth not a felony but a penalty.' (*Jones, supra,* 47 Cal.4th at p. 575, 98 Cal.Rptr.3d 546, 213 P.3d 997.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 742-743; footnotes omitted; italics in original.)

*Williams* observed that *Jones* distinguished *Montes,* quoting *Jones*: "'Thus, this court in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], narrowly construed the statutory phrase "a felony punishable by imprisonment ... for life," which appears in subdivision (b)(5) of section 186.22, as applying only to crimes where the underlying felony provides for a term of life imprisonment. (*Id.* at p. 352 [2 Cal.Rptr.3d 621, 73 P.3d 489].) Defendant here argues that to be consistent with *Montes,* we should give the statutory phrase "felony punishable by ... imprisonment in the state prison for life," which appears in subdivision (a)(17) of section 12022.53, the same narrow construction, and that, so construed, it does not include a life sentence imposed under an alternate penalty provision. *We agree with defendant that these statutory phrases should be construed similarly*. But we disagree that, construed narrowly, a felony that under section 186.22(b)(4) is punishable by life imprisonment is not a "felony punishable by ... imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of section 12022.53. [¶] 'Unlike the life sentence of the defendant in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under section 186.22(b)(4), which sets forth the *penalty for the underlying felony* under specified conditions. The difference between the two is subtle but significant. "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself,* when the jury has determined that the defendant has satisfied the conditions specified in the statute." [Citation.] Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of section 12022.53(c) was proper.' (*Jones, supra,* 47 Cal.4th at pp. 577–578, 98 Cal.Rptr.3d 546, 213 P.3d 997, some italics added.)" (*Williams*, *supra*, 227 Cal.App.4th at p. 743; italics in original; footnote omitted.)

In concluding the trial court erred in imposing the 10-year gang enhancement, *Williams* observed: "In this case, defendant received sentences of 25 years to life. These sentences of 25 years to life constitute life sentences within the meaning of section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) These life sentences resulted from the application of the Three Strikes law. The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of imprisonment to the base

term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions. (See, *e.g.*, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527, 53 Cal.Rptr.2d 789, 917 P.2d 628 ['The Three Strikes law ... articulates an alternative sentencing scheme for the current offense rather than an enhancement.'].)" (*Williams*, *supra*, 227 Cal.App.4th at p. 744.)

**Application of *Montes, Lopez, Jones* and *Williams* to Proposition 47**

Application of *Montes*, *Lopez*, *Jones*, and *Williams* to the Proposition 47 exclusion under section 667(e)(2)(C)(iv)(h) must be guided by the intent of the enactors in creating the restriction. It is clear the enactors specifically intended to exclude dangerous and violent offenders from any of the benefits of the initiative. "This Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." (Proposition 47, Section Two.) "Here's how Proposition 47 works: . . . *[It] Keeps Dangerous Criminal Locked Up*: [It] [a]uthorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation." (Argument in Favor of Proposition 47, Voter Information Guide, p. 38; italics in original.) "[Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (Rebuttal to Argument Against Proposition 47, Voter Information Guide, p. 39.) The initiative directs that it "shall be broadly construed to accomplish its purposes," and "shall be liberally construed to effectuate its purposes." (§§ 15 and 18, Proposition 47.)

Taking into consideration the intent of the enactors that the provisions of Proposition 47 be liberally and broadly construed to exclude dangerous and violent offenders from any of its benefits, it seems consistent that courts should consider the effect of enhancements in determining whether a particular person is excluded as having suffered an offense punishable by a life sentence.

Although *Montes* holds enhancements may not be considered for the purposes of the sentencing exception under section 186.22(b)(5) of the STEP act, the case is distinguishable from the issue presented by Proposition 47. *Montes* did not permit the use of life-term enhancements for the purpose of prohibiting the 10-year gang enhancement because to do so would conflict with the intent of the voters. Based on the language of the STEP act, the court concluded there was an intent to exclude the gang enhancement only when the crime itself specified a life term. (*Montes*, *supra*, 31 Cal.4th at pp. 358-359.) As further evidence of the voter's intent, the Supreme Court in *Montes* observed that the exception under section 186.22(b)(4) expressly included consideration of any enhancement, but under section 186.22(b)(5) it did not – the omission was intentional and indicative of the intent of the voters not to consider enhancements for that purpose. (*Montes*, at pp. 360-361.) No such intent appears in the language of Proposition 47 – indeed, the initiative indicates exactly the opposite

intent in its stated desire to deny its benefits to dangerous and violent offenders. Nothing in the initiative or in logic indicates that the enactors would want courts to exclude offenders who were convicted of crimes with stand-alone life terms, but not exclude offenders who got life terms because of an enhancement – these are all dangerous and violent persons.

***People v. Thomas* is inapplicable**

Also distinguishable is a line of cases where courts have interpreted similar life-term language in the context of credit limitations under section 2933.1. That section limits conduct credits for persons sent to prison for *violent* offenses to 15 percent. Section 667.5(c)(7) includes as a violent offense "[a]ny felony punishable by death or life imprisonment." In rejecting the argument that the limitation applies to all third strike offenders because of the Three Strikes law, *People v. Thomas* (1999) 21 Cal.4th 1122, 1130 (*Thomas*), held that "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." In accord are *People v. Henson* (1997) 57 Cal.App.4th 1380, and *People v. Philpot* (2004) 122 Cal.App.4th 893, 907-908.

As observed in *Thomas*: "[S]ection 1192.7, subdivision (c)(7) (section 1192.7(c)(7)), includes as a ' "serious" ' felony, '[*a*]*ny felony punishable by death or imprisonment in the state prison for life*.' (Italics added.) As can be seen, this language parallels the language at issue in section 667.5(c)(7). If we were to interpret section 667.5(c)(7) to mean a third strike defendant falls within its purview because of his life sentence, not because of the underlying offense, a similar interpretation would necessarily obtain for section 1192.7(c)(7). 'Under the three strikes law, a trial court must sentence a defendant with two or more qualifying prior felony convictions or strikes to an indeterminate term of life imprisonment.' (*People v. Dotson* (1997) 16 Cal.4th 547, 552.) A third strike would by definition, therefore, always qualify as a serious or violent offense. [¶] The plain language of the three strikes law and our cases interpreting it compel the opposite result. In *People v. Dotson*, *supra*, 16 Cal.4th 547, for example, this court observed that 'the defendant's current felony need not be "serious" for the three strikes law to apply,' and distinguished between 'a recidivist who committed a serious third strike felony' and one 'who committed a *non*serious third strike felony.' (*Id.* at p. 555, original italics; [' "It is certainly appropriate to punish more harshly those" ' three strikes defendants ' "convicted of new serious felonies" ' than those whose most recent felony is not serious.].) Were the Attorney General's interpretation of section 667.5(c)(7) correct, this distinction would be nonsensical. [¶] Indeed, as noted in *Henson*, if every third strike qualified as a serious felony, virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667, subdivision (a) (section 667(a)). (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1388.) This section 'imposes a five-year enhancement for each current conviction for a "serious" felony if the defendant previously has been convicted of a "serious" felony. If

a third strike were automatically considered a "serious" felony by virtue of the fact it carries a life sentence, the five-year enhancement would be imposed in every third strike case involving a prior serious felony conviction regardless of what offense constituted the third strike." (*Ibid.*, fn. omitted.) We have held otherwise. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529 ['The five-year enhancements mandated by section 667, subdivision (a), ... apply only when the defendant's current offense is a "serious felony" within the meaning of section 1192.7, subdivision (c), while the sentences mandated by the Three Strikes law apply whether or not the current felony is "serious." ']; *People v. Dotson*, *supra*, 16 Cal.4th at p. 555 [under section 667(a), 'the current felony offense must be "serious" within the meaning of section 1192.7, subdivision (c), for the five-year enhancement to apply'].) [¶] Given this limitation of section 667(a) five-year enhancements to recidivists whose current offenses are serious, it is equally appropriate to limit sections 2933.1 and 667.5(c)(7) to defendants whose current offenses, in and of themselves, and without reference to the punishment accorded under the three strikes law, are violent. (*People v. Henson*, *supra*, 57 Cal.App.4th at p. 1389.)" (*Thomas*, *supra*, 21 Cal.4th at pp. 1128-1129.)

The circumstances as discussed in *Thomas* are manifestly different than those contemplated by Proposition 47. The proposition does not involve consideration of whether a current non-violent offense becomes a statutorily defined violent offense under 667.5(c)(7) by using the Three Strikes law, such that virtually every third strike defendant would receive not only a life sentence but also a five-year enhancement under section 667. The *Thomas* line of cases is thus inapplicable to interpreting the initiative.

**Out-of-state convictions and juvenile adjudications**

Each code section modified or added by Proposition 47 excludes persons with out-of-state prior convictions that would qualify as "super strikes" in California and designated juvenile adjudications. Section 1170.18(i), for example, provides that "this section shall not apply to persons who have one or more prior *convictions* for an offense specified in" section 667(e)(2)(C)(iv) – the "super strikes." (Italics added.) Section 667(e)(2)(C)(iv) applies if "[t]he defendant suffered a prior serious and/or violent *felony conviction, as defined in subdivision (d) of this section*, for any of the following felonies. . . " – the "super strikes." (Italics added.) The reference to "subdivision (d) of this section" obviously means section 667(d). Section 667(d) provides that "[n]ot withstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior *conviction of a serious and/or violent felony* shall be defined as" (1) an adult California conviction under sections 667.5(c) and 1192.7(c) [§ 667(d)(1)]; (2) an out-of-state conviction "for an offense that, if committed in California is punishable by imprisonment in the state prison . . . if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of" a California serious or violent felony [§ 667(d)(2)]; and (3) designated juvenile adjudications [§ 667(d)(3)].

*People v. Carothers* (2017) 13 Cal.App.5th 459, 465, a Proposition 36 case, holds that an out-of-state conviction of what would be a super strike in California will disqualify the defendant from Proposition 36 relief. "Each of those provisions (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)) specifically refers to that section's definition of 'prior serious and/or violent conviction for a felony.' (§ 1170.12, subd. (b).) Under that definition, '[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7.' (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) [¶] Read together, the meaning of these provisions is clear and unambiguous. An inmate is not eligible for resentencing under section 1170.126 if he or she has a prior out-of-state conviction for an offense that, if committed in California, includes all of the elements of any of the super strike offenses appearing in section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv)." In *Carothers*, however, the court found insufficient information in the record of conviction that the defendant's prior Texas murder conviction would have been murder under California law.

Since the definition of "conviction of a serious and/or violent felony" contained in section 667(d) is incorporated by reference in section 1170.18(i), and since that definition specifically includes designated juvenile adjudications, a person who has been adjudicated for an offense listed in section 667(d)(3) will be excluded from the benefits of Proposition 47. (*People v. Sledge* (2017) 7 Cal.App.5th 1089.) While juvenile "adjudications" and adult "convictions" are distinguished in many other contexts, for the purposes of the exclusion under section 1170.18(i), they are treated the same. Section 667(d)(3) provides that "[a] prior juvenile adjudication shall constitute a *prior serious and/or violent felony conviction* for purposes of sentence enhancement if:

> (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.
>
> (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a serious and/or violent felony.
>
> (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." (See also *People v. Fernandez* (2017) 11 Cal.App.5th 926, 935.)

In two Proposition 36 cases, juvenile adjudications have been used as disqualifiers. *People v. Arias* (2015) 240 Cal.App.4th 161, holds that a qualified juvenile adjudication will constitute a disqualifying prior conviction for the purposes of Proposition 36. The provisions of Welfare and Institutions Code, section 203, which specify that juvenile adjudications are precluded from being considered "convictions" "for any purpose," have no application to the Three Strikes law and Proposition 36. Generally in accord with *Arias* is *People v. Thurston* (2016) 244 Cal.App.4th 644.

*A. Persons required to register as a sex offender*

A person also will be excluded from any of the benefits of Proposition 47 if he has committed "an offense requiring registration pursuant to subdivision (c) of Section 290." (See, *e.g.*, § 459a(a).) It is important to observe the precise words of the exclusion: the statute will exclude a defendant from the benefits of Proposition 47 only if he has "one or more prior *convictions* . . . for an *offense requiring registration*" and only if the requirement is pursuant to an offense listed in section 290(c). (Italics added.) The italics in the statute is on the *conviction* of a *crime* requiring registration, not the registration requirement. The language of section 290(c) mandates registration for all of the listed offenses. The court's discretionary authority to require an offender to register as a sex offender, for example, is found in section 290.006, a circumstance not listed in section 290(c). Thus, it appears offenses which do not mandatorily require sex registration, but for which the trial court deems appropriate in its discretion to impose registration, are not included in this exclusion.

There is one exception to the requirement that the registration be due to a *conviction* for a sex offense be listed in section 290(c). Section 666 excludes all persons *required to register* under the registration act, regardless of how the registration requirement was imposed. Accordingly, a defendant required to register because of a juvenile adjudication was excluded from the benefits of Proposition 47. (*People v. Dunn* (2016) 2 Cal.App.5th 153; see discussion of § 666, *infra*.) Other than in the context of a conviction for petty theft with a prior under section 666, however, juvenile adjudications resulting in the requirement to register as a sex offender will not exclude a person from the benefits of Proposition 47. (*People v. Zamora* (2017) 11 Cal.App.5th 728.)

*People v. Hofsheier* (2006) 37 Cal.4th 1185, held registration for a conviction of section 288a(b)(1), oral copulation of a person under 18, was not mandatory, but rather discretionary under section 290.006. The decision was based on a denial of equal protection – that there was no rational basis for requiring registration for consensual sexual offenses, such as section 288a(b)(1), but not for unlawful sexual intercourse. Cases following *Hofsheier* extended its holding to a number of other sexual offenses where the activity was essentially consensual between the persons involved. The Supreme Court has overruled *Hofsheier* in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, finding there is indeed a rational basis for not mandating registration for

unlawful sexual intercourse, but requiring it in other non-forcible sexual offenses. The court disapproved the following cases to the extent they were inconsistent with *Johnson*: *People v. Garcia* (2008) 161 Cal.App.4th 475; *People v. Hernandez* (2008) 166 Cal.App.4th 641*; In re J.P.* (2009) 170 Cal.App.4th 1292; *People v. Ranscht* (2009) 173 Cal.App.4th 1369; *People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Thompson* (2009) 177 Cal.App.4th 1424; and *People v. Ruffin* (2011) 200 Cal.App.4th 669. (*Johnson*, at p. 888.)

The court made the holding in *Johnson* fully retroactive. (*Johnson*, *supra*, 60 Cal.4th at p. 889.) While the full implications of retroactivity may not be entirely clear, it is likely the decision will apply to previous cases where the court did not order registration or granted a request to end the registration requirement based on *Hofsheier* or its progeny. Since the exclusion in Proposition 47 is based on a *conviction* of an offense requiring registration, whether or not the offender was *actually* registered is immaterial. A person previously convicted of *any* offense listed in section 290(c) will be excluded from any of the benefits of Proposition 47.

*B. Whether disqualifying crimes or sex registration must be "pled and proved"*

Whether the prosecution is required to "plead and prove" the existence of a disqualifying prior conviction likely will depend on the precise issue before the court. Specifically, there may be a different rule depending on whether the court is dealing with the *retrospective* portions of the initiative in an application for resentencing or reclassification, or the *prospective* portions of Proposition 47 in sentencing a crime committed on or after November 5, 2014.

1. Retrospective application of Proposition 47

If the court is dealing with either a petition for resentencing or application for reclassification, there is nothing in section 1170.18 that imposes a specific "plead and prove" requirement regarding the disqualifying prior convictions. In interpreting analogous provisions of Proposition 36, the courts have consistently held there is no such obligation. (See *People v. White* (2014) 223 Cal.App.4th 512, 526; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1315-1316; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1333; and *People v. Guilford* (2014) 228 Cal.App.4th 651.) As a practical matter, however, the prosecution has the burden of proving that the petitioner has suffered a disqualifying prior conviction.

The petitioner likely has no right to a jury determination of his eligibility for resentencing. *Apprendi v. New Jersey* (2000) 530 U.S. 466, has been held to have no application to the retrospective nature of the petition under the resentencing provisions of Proposition 36. (See *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1315; *People v. Bradford*, *supra*, 227 Cal.App.4th at pp. 1331-1336; *People v.*

*Guilford*, *supra*, 228 Cal.App.4th at pp. 662-663; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.) There will be no different right for proceedings brought under Proposition 47.

2. Prospective application of Proposition 47

There is no requirement in Proposition 47 that the prosecution "plead and prove" a disqualifying prior conviction as to crimes committed on or after November 5, 2014. While the prospective portions of Proposition 36 expressly require the prosecution to "plead and prove" any factors that disqualify a defendant from receiving a second strike sentence under the new rules, (§ 667(e)(2)(C)), no such express "plead and prove" requirement is included in the new penalty provisions of Proposition 47.

The "plead and proof" requirement has its roots in the seminal U.S. Supreme Court case of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). *Apprendi* observed that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi,* at p. 490; italics added.)

As made clear in *Apprendi*, the defendant has no constitutional right to a jury trial on the fact of a prior conviction. Based on the assumption that the defendant had certain due process protections when the prior conviction was obtained, *Apprendi* does not require a jury determination of the existence of a prior conviction. (*Apprendi*, *supra*, 530 U.S. at pp. 488 – 490.) The right to a jury determination of a prior conviction arises in California only because of statute, and only when the prior conviction is alleged in the accusatory pleading. (§§ 1025 and 1158.)

In the absence of a statutory requirement to "plead and prove" a disqualifying prior conviction, and because a jury determination is not required as a matter of constitutional right, likely there is no "plead and prove" requirement for prior convictions or sex registration that disqualify a defendant from receiving the reduced penalties provided by Proposition 47. The California Supreme Court has refused to imply a pleading a proof requirement in similar instances where the Legislature has failed to expressly impose such a requirement. (*People v. Lara* (2012) 54 Cal.4th 896, 902 [custody credits].)

Until the issue is resolved in the context of Proposition 47, however, the prudent prosecutor may wish to specifically plead the existence of a disqualifying prior conviction or sex registration as to crimes committed on or after November 5, 2014. In any event, as with the retrospective application of Proposition 47, the prosecution will be required to prove the defendant has been convicted of a

disqualifying offense in a prospective application of the new sentencing provisions.

3. Value of property taken

To the extent the prosecution seeks to establish a theft offense as a felony because the value of the property taken is in excess of $950, value will be an element of the crime and must be presented to the trier of fact for determination. Under such circumstances the allegation of value should be included in the complaint or information. It would be the court's prerogative in submitting the matter to a jury whether the value is simply included as an element of the felony theft charge, or whether the jury is asked to make a special finding on the truth of the allegation in the same manner as is done for enhancements.

4. Use of section 1385

It is unlikely an offender will be able to use section 1385 to dismiss any disqualifying prior convictions so as to avail himself of any of the benefits of Proposition 47. Unlike the Realignment Law, the initiative contains no express prohibition preventing the use of section 1385. (See § 1170(f).) However, the enactors have clearly stated that persons who stand convicted of designated "super strikes" or are required to register as a sex offender are not to benefit from the new law. It is likely the existence of the disqualifiers are "sentencing factors" that may not be eliminated with the use of section 1385.

A similar issue was addressed by the Supreme Court in *In re Varnell* (2003) 30 Cal.4th 1132, in the context of Proposition 36 drug treatment. There, persons who have suffered designated prior serious or violent felony convictions are precluded from participating in the drug treatment program. The court addressed the application of section 1385 to remove the disqualifying prior conviction: " 'The *only* action that may be dismissed under Penal Code section 1385, subdivision (a), is a criminal action or a part thereof.' (*People v. Hernandez* [(2000) 22 Cal.4th 512,] 524, italics added.) We have consistently interpreted 'action' to mean the 'individual charges and allegations in a criminal action' (*id.* at pp. 521-522, 523; *People v. Burke* [(1956) 47 Cal.2d 45,] 50) and have never extended it to include mere sentencing factors. Thus, our courts have refused to permit trial courts to invoke section 1385 to dismiss sanity proceedings or a plea of insanity (*Hernandez*, supra, 22 Cal.4th at pp. 522-524); to reduce a verdict of first degree murder to second degree murder (*People v. Superior Court* (*Prudencio*) (1927) 202 Cal. 165, 173-174, disapproved on other grounds in *People v. Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 501; cf. § 1181, pars. 6, 7); to reduce the offense of conviction to an uncharged lesser related offense (*People v. Smith* (1975) 53 Cal.App.3d 655, 657-658); or to enter a judgment of

acquittal (*People v. Superior Court* (*Jonsson*) (1966) 240 Cal.App.2d 90, 92-93, disapproved on other grounds in *People v. Superior Court* (*Howard*), *supra*, 69 Cal.2d at p. 501). A ruling that section 1385 could be used to disregard sentencing factors, which similarly are not included as offenses or allegations in an accusatory pleading, would be unprecedented. [¶] It also would be inconsistent with our description of the *effect* of a section 1385 dismissal. As we have repeatedly emphasized, dismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.' (*People v. Burke*, *supra*, 47 Cal.2d at p. 51; *People v. Garcia* (1999) 20 Cal.4th 490, 496.) 'When a court strikes prior felony conviction allegations in this way, it " 'does not wipe out such prior convictions or prevent them from being considered in connection with later convictions. ' " (*People v. Superior Court* (*Romero*)[(1996) 13 Cal.3d 497,] 508, quoting *People v. Burke*, *supra*, 47 Cal.2d at p. 51.) Thus, while a dismissal under section 1385 ameliorates the effect of the dismissed charge or allegation, the underlying facts remain available for the court to use. Hence, the trial court's dismissal of the 'strike' allegation in this case did not wipe out the fact of the prior conviction and the resulting prison term that made petitioner ineligible under subdivision (b)(1) of section 1210.1." (*Varnell*, *supra*, 30 Cal.4th at pp. 1137-1138; italics in original; footnote deleted.)

In summarizing its holding, the court observed: "We therefore hold that a trial court's power to dismiss an 'action' under section 1385 extends only to charges or allegations and not to *uncharged* sentencing factors, such as those that are relevant to the decision to grant or deny probation (e.g., Cal. Rules of Court, rule 4.414(b)(1)) or to select among the aggravated, middle, or mitigated terms (e.g., *id*., rule 4.421(b)(1)). Section 1210.1 . . . does not require that the basis for a defendant's ineligibility be alleged in the accusatory pleading. In the absence of a charge or allegation, there is nothing to order dismissed under section 1385." (*Varnell*, *supra*, 30 Cal.4th at p. 1139.)

Similar reasoning was used in the context of disqualification from enhanced custody credits in an earlier version of section 4019. (*People v. Lara* (2012) 54 Cal.4th 896, 900-901.)

*C. Punishment of excluded offenders*

Proposition 47 provides that if a person is excluded from the misdemeanor punishment provided in the new statutes, the person "may be punished pursuant to subdivision (h) of Section 1170." (See, *e.g*., § 459a(a).) It does not appear that this language is intended to override the exclusions in section 1170(h)(3) which preclude certain offenders from receiving a county jail sentence under section 1170(h). All of the exclusions listed in section 667(e)(2)(C)(iv) for the purposes of Proposition 47 will exclude persons from a county jail commitment for the purposes of section 1170(h)(5).

The general reference to "subdivision (h) of section 1170" in Proposition 47 incorporates *all* of the provisions of subdivision (h), including the exclusions listed in section 1170(h)(3). There is no express negation of the requirement that an offender must be sent to prison if probation is denied, and the person has a prior or current conviction of a serious or violent felony, is required to register as a sex offender, or has an enhancement for aggravated theft under section 186.11. (§ 1170(h)(3).) Indeed, to allow such persons to be sentenced to county jail instead of being sent to prison would be contrary to the expressed intent of Proposition 47 to "include strict protections to protect public safety and make sure rapists, murders, molesters and the most dangerous criminals cannot benefit." (Rebuttal to Argument Against Proposition 47, Official Ballot Statements, p. 39.)

**"Wobbler" offenses**

It is not entirely clear whether an excluded offender may be prosecuted as a misdemeanant for a crime previously categorized as a "wobbler," or whether the offender must face straight felony punishment. This issue is illustrated by the language used in section 473, the crime of forgery. Prior to the enactment of Proposition 47, section 473(a) specified that "[f]orgery is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170." It is well understood that the latter language creates the classic "wobbler," in that it may be prosecuted as a felony or misdemeanor. Proposition 47 amends section 473 by adding subsection (b) which specifies that, "[n]otwithstanding subdivision (a)," if the amount of the forged instrument does not exceed $950, the offense "shall be punishable by imprisonment in a county jail for not more than one year, except that such person *may instead be punished* pursuant to" section 1170(h) if there is a prior conviction for an excluding offense. (Italics added.) The new language in subdivision (b) does not say that the person may be punished either by county jail *or* under section 1170(h) as it does in subdivision (a). While the change in language raises some question about the intent of the enactors, because section 473(a) was not amended to eliminate a misdemeanor disposition, likely the offenders falling within subdivision (a) may still receive misdemeanor disposition without reference to the new penalties under Proposition 47.

Other crimes amended in the proposition are clearer in their punishment provisions. For example, the language used in section 473 is in contrast with the language in Health and Safety Code, section 11350, which provides that possession of the narcotics "shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to" section 1170(h) if excluded. The language in section 11350 evidences a clear intent to keep the crime a straight felony if the person is excluded from Proposition 47.

### *D. Organized retail theft*

Effective January 1, 2019, the Legislature created the crime of "organized retail theft" which may be prosecuted independent of Proposition 47, regardless of the value of the stolen merchandise. The new statute will sunset January 1, 2021.

Section 490.4, subdivision (a), defines the crime: "A person who commits any of the following acts is guilty of organized retail theft, and shall be punished pursuant to subdivision (b):

(1) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value.

(2) Acts in concert with two or more persons to receive, purchase, or possess merchandise described in paragraph (1), knowing or believing it to have been stolen.

(3) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft.

(4) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of the acts described in paragraph (1) or (2) or any other statute defining theft of merchandise."

Depending on the value of the merchandise and whether there are multiple convictions of the crime, violations may be punished as a straight misdemeanor or as a "wobbler." (§ 490.4, subd. (b).) If the court grants probation, it must consider a "stay-away" order "from retail establishments with a reasonable nexus to the crime committed." (§ 490.4, subd. (e).)

## IV. Reduction of Penalties

Proposition 47 amends various provisions of the Penal and Health and Safety Codes to reduce personal possession drug offenses and thefts involving less than $950 from a straight felony or a "wobbler," to a straight misdemeanor. (For a table of Proposition 47 crimes, see Appendix III.) It is important to note, however, that the reduction in penalty only is available to persons who do not have a prior conviction for any of the specified "super strikes," and are not required to register as a sex offender. (See Section III, *supra*, for a discussion of exclusions.)

*A. Penal Code violations*

1. **Section 459.5** (new) – Shoplifting [punishment: up to 6 months in jail (see § 19)]. Section 459.5 provides that "[n]otwithstanding section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed . . . $950." (§ 459.5(a).) Any other entry with intent to commit theft is burglary. "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5(b).)

If a defendant has been charged with a commercial burglary based on facts which now constitute "shoplifting," but has not been sentenced as of November 5, 2014, it is likely the defendant will be able to request the court to amend the charges to a violation of section 459.5. It also appears that a petitioner seeking resentencing or an applicant for reclassification can request a change of a prior second-degree burglary conviction to shoplifting for a crime sentenced prior to November 5th, if the facts of the crime meet the definition is section 459.5(a). Section 1170.18(a) provides that "[a] person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing in accordance with . . . section 459.5. . . ." Section 1170.18(f) provides similar language for reclassification of offenses. If the facts of the crime fit "shoplifting," certainly the defendant would have been convicted of a violation of section 459.5 had the statute then been in effect. While section 3 provides that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared," it seems section 1170.18(a) contains just such an express declaration because it authorizes resentencing of a crime under section 459.5 even though it occurred prior to November 5, 2014.

There is some confusion over the proper numbering of this new crime. In the version of the initiative originally submitted to the Secretary of State, the statute was designated as section 459a. In the version submitted to the voters in the Voter Information Guide, the statute is designated as section 459.5. Likely the final version of the statute will be as submitted to the voters.

If the crime involves the simple theft of merchandise displayed for sale, there is no question the crime fits within section 459.5 if the value does not exceed $950. Appellate courts have been divided on whether the crime applies to less obvious forms of theft such as attempting to cash a forged or stolen check. The issue usually arises in the context of a request for relief under section 1170.18 where the defendant has been convicted of the crime of second degree burglary.

Since burglary is committed with the entry into a building "with the intent to commit grand or petit larceny or any other felony," the courts have struggled with whether the tendering of a fraudulent check is actually "larceny." The issue has been resolved by the Supreme Court in *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*). In *Gonzales* the defendant entered a bank to cash a stolen check of less than $950. The court found the conduct to be shoplifting as defined by section 459.5. The court observed that section 490a provides that whenever a statute references "larceny, embezzlement or stealing," it must be interpreted as "theft." The court applied section 490a to crimes committed under section 459.5. (*Id*., at pp. 868-875.) The court specifically held that "shoplifting" is not limited to situations where the defendant steals merchandise on display. (*Id*., at pp. 873-874.) If section 459.5 applies, the defendant may not be alternatively charged with burglary or identity theft. (*Id*., at pp.876-877.)

In *People v. Jimenez* (2020) 9 Cal.5th 53 (*Jimenez*), the Supreme Court held the crime of shoplifting under section 459.5 does not include the crime of misuse of personal identifying information under section 530.5. "[W]e conclude that section 459.5 does *not* encompass misuse of identifying information. The preclusive language of section 459.5, subdivision (b) — that '[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting,' and '[n]o person who is charged with shoplifting may also be charged with theft or burglary of the same property' — applies only as to theft or burglary offenses. Section 530.5, subdivision (a) does not define such an offense." (*Jimenez*, at p. 61; italics in original.)

The court further explained its decision in relationship to *Gonzales*: "Jimenez . . . argues that Gonzales stands for the proposition that whenever a defendant's conduct constitutes shoplifting, it can only be charged as shoplifting. [¶] This argument misses the mark. Gonzales resolved a different question: whether a defendant was eligible for misdemeanor shoplifting resentencing under Proposition 47 when his conviction was for burglary based on a course of conduct involving entering a store to cash a fraudulent check. Our decision in Gonzales explained that the defendant was eligible for resentencing on those facts because of what was essentially a perfect overlap between the charged burglary and the facts that would have supported the shoplifting charge: The course of conduct rested on precisely the same entry, with the same intent, to take the same property, as would have supported a shoplifting charge. So Proposition 47's mandate that '[a]ny act of shoplifting ... be charged as shoplifting' and '[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property' applied with full force. When we explained that a 'defendant must be charged only with shoplifting when the statute applies' (Gonzales, supra, 2 Cal.5th at p. 876, 216 Cal.Rptr.3d 285, 392 P.3d 437), what we meant is simply that a person whose conduct constitutes shoplifting could not be charged with burglary or a theft crime for that same

conduct instead of shoplifting, as occurred in Gonzales. It does not follow that similar conduct, including conduct that fulfills the elements of the misuse of personal identifying information under section 530.5, subdivision (a), must always be charged only as shoplifting, even if no conviction for burglary or theft — the only crimes barred under section 459.5, subdivision (b) — is at issue. In fact, no conviction for personal identifying information misuse even occurred in Gonzales." (*Jimenez*, at pp. 68-69.)

In accordance with *Jimenez*, *People v. Harrell* (2020) 53 Cal.App.5th 256 (*Harrell*), holds section 530.5, subdivision (c), is not a theft offense. "Jimenez compels the conclusion that section 530.5(c) is not a theft offense. Beginning with its statutory language, section 530.5(c) contains no reference to theft, nor do its elements align with a quintessential theft offense. Like section 530.5(a), this provision can be violated absent an intent to commit theft and whether or not the victim's information was actually stolen. Further, section 530.5(c) is an integral part of the statutory scheme that targets social harms flowing from the misuse of a person's identity, as opposed to the unlawful taking of property. Operating outside the law of theft, section 530.5 addresses unique concerns attendant to misuse of another person's identity. Subdivisions (a) and (c) of this statute function in tandem to achieve this purpose." (*Harrell*, *supra*, 53 Cal.App.5th at pp. 263-264.)

For the purpose of determining the value of stolen merchandise in the context of whether the crime is shoplifting or burglary, it is proper for the trier of fact to consider the sales tax that would have been charged. *People v. Seals* (2017) 14 Cal.App.5th 1210, 1219, observed: "In adding sales tax reimbursement to the price of an item, the retailer is not merely collecting a tax on behalf of the state. Instead, the retailer is passing on a cost—for which only it is responsible—to the buyer. Further, when a retailer adds an amount for sales tax reimbursement to the total price of an item, that ultimate price is the highest price to which the willing and informed buyer and seller agree. We agree with [*Xerox Corp. v. Orange County* (1977) 66 Cal.App.3d 746] . . . that the fair market value test allows for inclusion of sales tax reimbursement in the valuation when price is the basis of value."

"Shoplifting" does not apply to a commercial burglary conviction for entering into an office of the Department of Motor Vehicles for the purpose of submitting a fraudulent application for a driver's license. (*People v. Chen* (2016) 245 Cal.App.4th 322.)

"Shoplifting" includes the attempt to sell a stolen surfboard of less than $950 in value. (*People v. Fusting* (2016) 1 Cal.App.5th 404.)

The fact that defendant entered with another person to commit petty theft – in essence conspired to commit larceny – does not remove the crime from the shoplifting statute. (*People v. Huerta* (2016) 3 Cal.App.5th 539, 544-545.) However, in *People v. Martin* (2018) 26 Cal.App.5th 825 (*Martin*), the defendant was part of an international conspiracy to commit petty thefts. The court held Proposition 47 inapplicable. "The fabric of the law will stretch only so far before it will unravel. Here, a professional thief entered in to an international conspiracy to commit as many petty thefts as she could get away with. She was foiled by security guards and the police. She seeks to stretch Proposition 47 to cover her conspiracy to commit petty theft. She convinced the trial court. But it just won't stretch that far. It is difficult, if not impossible, to believe that the electorate intended that a person, such as respondent, with five prior separate prison terms who joined an international conspiracy to commit petty theft, would deserve misdemeanor treatment. To say it out loud or put it on paper causes considerable pause." (*Martin*, at p. 828.)

Using a forged prescription to obtain drugs is not "shoplifting." (*People v. Brown* (2017) 7 Cal.App.5th 1214; in accord is *People v. Gollardo* (2017) 17 Cal.App.5th 547.)

When assessing whether the defendant took more than $950 for the purposes of shoplifting, the value of stolen good pawned by a defendant is determined by the amount of money received from the pawnbroker. "If a petitioner or applicant who successfully pawned stolen goods can prove that he or she received $950 or less in exchange for the stolen property—in other words, that the pawning of the goods did not injure the pawn shop beyond the $950 threshold applicable in most theft cases—he or she should be entitled to relief under a liberally construed Proposition 47." (*People v. Pak* (2016) 3 Cal.App.5th 1111, 1120.)

The attempt to break into a coin operated soap dispenser at a commercial laundromat where the machine contains less than $950 is shoplifting. (*People v. Bunyard* (2017) 9 Cal.App.5th 1237.)

*People v. Jennings* (2019) 42 al.App.5th 664 (*Jennings*), holds in establishing a case of commercial burglary under section 459, the People must disprove the crime of shoplifting under section 459.5: "The new misdemeanor crime of shoplifting 'covers conduct that previously would have been classified as a burglary.' (E.P., supra, 35 Cal.App.5th at p. 797, 247 Cal.Rptr.3d 587.) [¶] Section 459 defines the offense of burglary, providing in pertinent part that a 'person who enters any ... store ... with the intent to commit grand or petit larceny or any felony is guilty of burglary.' However, on its enactment in 2014, 'section 459.5 amended section 459 to exclude certain wrongful conduct which previously was second degree burglary.' (E.P., supra, 35 Cal.App.5th at p. 798,

247 Cal.Rptr.3d 587.) Therefore, a defendant now cannot 'simultaneously commit shoplifting and second degree burglary.' (E.P., at p. 798, 247 Cal.Rptr.3d 587.) [¶] E.P. stated: 'Because a person cannot commit burglary if he actually committed shoplifting, a prosecutor who wishes to convict a defendant of burglary must prove the defendant did not commit shoplifting. [Citations.] Evidence the defendant committed shoplifting disproves the elements of the charged commercial burglary. Under these circumstances, the court must instruct the jury the prosecution has the burden to disprove the element(s) of shoplifting beyond a reasonable doubt to secure a burglary conviction.' (E.P., supra, 35 Cal.App.5th at p. 798, 247 Cal.Rptr.3d 587.) Alternatively stated, to prove that a defendant committed section 459 burglary based on a theory of intent to commit larceny when entering a commercial establishment that is open during regular business hours, 'the prosecution [has] the burden of proving beyond a reasonable doubt that [the defendant] did not commit shoplifting.' (Id. at p. 799, 247 Cal.Rptr.3d 587.)" (*Jennings*, *supra*, 42 Cal.App.5th at pp. 670-671.)

*Jennings* further held the court has a sua sponte duty to instruct the jury in a burglary case that to convict the defendant of the charge, it must find beyond a reasonable doubt the value of the property defendant intended to take when entering the commercial establishment exceeded $950. (*Jennings*, at pp. 678-679.)

**Commercial establishment**

The decision in *In re J.L* (2015) 242 Cal.App.4th 1108, discusses the definition of "commercial establishment." The minor stole a cell phone from the public high school locker of a fellow student. In affirming the adjudication of the minor for burglary, the court held the location of the theft did not occur at a "commercial establishment" as contemplated by section 459.5. "Whatever broader meaning 'commercial establishment' as used in section 459.5 might bear on different facts, J.L.'s theft of a cell phone from a school locker room was not a theft from a commercial establishment. Giving the term its commonsense meaning, a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources. (Webster's 3d New Internat. Dict. (2002) p. 456 ['commercial' means 'occupied with or engaged in commerce' and 'commerce' means 'the exchange or buying and selling of commodities esp. on a large scale']; The Oxford English Reference Dict. (2d ed. 1996) p. 290 [defining 'commerce' as 'financial transactions, esp. the buying and selling of merchandise, on a large scale']; Black's Law Dict. (10th ed. 2014) p. 325 ['commercial' means '[o]f, relating to, or involving the buying and selling of goods; mercantile']; see also 37 C.F.R. § 258.2 [copyright regulation defining the term 'commercial establishment' as 'an establishment used for commercial

purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with common business areas']; Gov. Code § 65589.5 [defining 'neighborhood commercial' land use as 'small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood']; *People v. Cochran* (2002) 28 Cal.4th 396, 404–405, 121 Cal.Rptr.2d 595, 48 P.3d 1148 [citing dictionary definition of commerce, '[t]he buying and selling of goods, especially on a large scale,' in interpreting statutory phrase 'commercial purpose'].) A public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students. [¶] We believe the voters enacting Proposition 47 understood the reference to 'shoplifting' in the ballot pamphlet materials, including in the title and text of section 459.5, in the same way. Shoplifting is commonly understood as theft of merchandise from a store or business that sells goods to the public. (Webster's 3d New Internat. Dict., *supra,* p. 2101 [defining shoplifting as 'the stealing of goods on display in a store']; Black's Law Dict., *supra,* p. 1590 ['Theft of merchandise from a store or business; specif., larceny of goods from a store or other commercial establishment by willfully taking and concealing the merchandise with the intention of converting the goods to one's personal use without paying the purchase price'].) Except for perhaps a school cafeteria or bookstore (circumstances not at issue here, where the phone was stolen from a school locker), a public school is not engaged in the business of selling merchandise or goods at all. It is therefore immaterial, as defendant contends, that a school maintains regular hours, accepts phone calls, or may handle payroll in connection with its personnel. Looking to the ordinary meaning of the statutory language, we simply do not believe that the voters enacting Proposition 47 understood a public high school to be a commercial establishment or a theft from a school locker to be 'shoplifting.'" (*J.L.*, *supra*, 242 Cal.App.4th at pp. 1114-1115.)

Entry into a locked storage unit does not constitute entry into a "commercial establishment" for the purposes of shoplifting. (*People v. Stylz* (2016) 2 Cal.App.5th 530.)

A private golf and country club is a "commercial establishment." (*People v. Holm* (2016) 3 Cal.App.5th 141.)

Entry into a commercial establishment's employee restroom for the purpose of committing larceny qualifies as a "commercial establishment." (*People v. Hallam* (2016) 3 Cal.App.5th 905.)

Entry into an interior room of a commercial establishment with intent to commit theft is a burglary, not shoplifting. "[W]e conclude that entering an interior room that is objectively identifiable as off-limits to the public with intent to steal

therefrom is not punishable as shoplifting under section 459.5, but instead remains punishable as burglary." (*People v. Colbert* (2019) 6 Cal.5th 596, 608 (*Colbert*).) In light of *Colbert*, the holding in *People v. Franske* (2018) 28 Cal.App.5th 955, likely is disapproved [entry into an office of a commercial business and taking $242 in cash from a purse qualifies as "shoplifting" under the Act].

In *People v. Osotonu* (2019) 35 Cal.App.5th 992 (*Osotonu*], the defendant used explosives to access the back of an ATM machine for its cash. Relying on *Colbert*, the appellate court held Proposition 47 did not apply to these circumstances. "Here, it cannot be seriously disputed that Osotonu's use of explosives to access the inside of the ATM posed a serious danger to personal safety to anyone in the vicinity of the ATM. Indeed, the force of the explosives was enough to break apart the steel frame and cause a crater in the cement wall near the machine. By using explosives, as opposed to a stolen debit card (see, e.g., [*People v. Davis* (1998) 18 Cal.4th 712,] 722), Osotonu unquestionably exceeded the physical scope of his invitation when he blew open the ATM. The interior of an ATM, like a locked vault inside a bank, was objectively identifiable as off-limits. For these reasons, and following the rationale of *Colbert*, we conclude that using explosives to blow open an ATM is not punishable as shoplifting under section 459.5." (*Osotonu*, at p. 997.)

**Charging discretion of the prosecution**

Section 459.5, subdivision (b), provides: "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." The limitation of the prosecution's charging discretion was discussed in *People v. Lopez* (2020) 9 Cal.5th 254 [*Lopez*]. The court summarized its holding: "We hold that section 459.5(b) prohibits charging shoplifting and theft of the same property, even in the alternative. But a prosecutor may charge shoplifting with an allegation stating that 'the value of the property taken does not exceed $950,' such that petty theft is an uncharged lesser included offense under the accusatory pleading test. Consistent with the principles governing instructions on lesser included offenses, if shoplifting is so charged, and if there is substantial evidence from which a jury could conclude that the defendant committed petty theft but not shoplifting, the trial court is required to instruct the jury on petty theft, and the jury is required to return an acquittal on shoplifting before it may return a verdict on petty theft. [¶] Additionally, we hold that, as a general rule, section 459.5(b) prohibits a prosecutor from charging theft when there is probable cause that a defendant has committed shoplifting of the same property. As an exception to this general rule, however, even when there is probable cause that a defendant has committed shoplifting, a prosecutor may charge theft instead of shoplifting if the prosecutor can articulate a theory

supported by the evidence under which the defendant would be guilty of theft but *not* shoplifting." (*Lopez*, at p. 263; italics in original.)

The court found the act clearly prohibits charging shoplifting and petty theft in the alternative. "[W]e agree with the parties that section 459.5(b)'s second directive unambiguously prohibits charging shoplifting and theft of the same property, even in the alternative, and that the plain meaning of the directive should control. (See *Desny v. Wilder* (1956) 46 Cal.2d 715, 729, 299 P.2d 257 [court not bound to accept parties' concessions on issues of law]; *Bradley v. Clarke* (1901) 133 Cal. 196, 209–210, 65 P. 395[same].) We recognize the Court of Appeal's concern that this interpretation may lead to the unintended consequence that a defendant who has committed theft may escape criminal liability simply because he is charged with shoplifting and the jury entertains a reasonable doubt about one of shoplifting's elements. But we are not persuaded that this possibility is so absurd as to justify a departure from the plain meaning of the statutory language. (See *Lopez v. Sony Electronics, Inc*. (2018) 5 Cal.5th 627, 638, 234 Cal.Rptr.3d 856, 420 P.3d 767 ['To justify departing from a literal reading of a clearly worded statute, the result must be so unreasonable that the Legislature could not have intended it.'].)" (*Lopez*, at pp.268-269.)

The court also found, however, the prosecution could charge shoplifting such that the theft is a lesser included offense. "[C]onsistent with section 459.5(b), a prosecutor may charge shoplifting with an allegation that 'the value of the property taken does not exceed $950,' such that petty theft is an uncharged lesser included offense of shoplifting under the accusatory pleading test. In accord with the principles governing instructions on lesser included offenses, if shoplifting is so charged and if there is substantial evidence the defendant has committed petty theft but not shoplifting, the trial court must instruct the jury on petty theft, and the jury must return an acquittal on the shoplifting charge before it may return a verdict on petty theft. If defendant is convicted of shoplifting, he may not also be convicted of petty theft." (*Lopez*, at p. 271.)

Finally, the court concluded there are circumstances where the prosecution can charge *only* the crime of theft. "[W]e conclude that, as a general rule, section 459.5(b) prohibits a prosecutor from charging burglary or theft instead of shoplifting when there is probable cause that a defendant has committed shoplifting of the same property. Therefore, in the common situation where a defendant is apprehended leaving a store with unpurchased merchandise worth $950 or less, the prosecutor may charge shoplifting only—even though there would also be probable cause to support a charge of petty theft. As we stated in *Gonzales, supra*, 2 Cal.5th 858, at page 876, 216 Cal.Rptr.3d 285, 392 P.3d 437, 'A defendant must be charged only with shoplifting *when the statute applies*. [Section 459.5] expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct.' (Italics added.) ¶

We also agree with the Attorney General, however, that there are exceptions to this general rule. Even when there is probable cause that a defendant has committed shoplifting, section 459.5(b) does not prevent a prosecutor from charging burglary or theft *instead of* shoplifting—initially, or in an amendment to the accusatory pleading within the constraints of section 1009—if the prosecutor can articulate a theory supported by the evidence under which the defendant would be guilty of the charged offense but *not* shoplifting. In these cases, section 459.5(b)'s prohibition on 'alternate charging' does not apply. (*Gonzales, supra*, 2 Cal.5th at p. 876, 216 Cal.Rptr.3d 285, 392 P.3d 437.)" (*Lopez*, at pp. 274-275; italics in original; footnote omitted.)

The foregoing rules of charging were illustrated by the facts of this case: "The asset protection officer observed defendant place items into an empty Walmart plastic bag within his shopping cart and exit the store without paying for them. Defendant then admitted that he had not paid for the items, and the asset protection officer determined their combined value to be $496.37. Although these facts constitute probable cause that defendant committed both shoplifting and petty theft, section 459.5(b)'s general rule—that a prosecutor may charge only shoplifting when there is probable cause that the defendant has committed shoplifting—would have prohibited the prosecutor from charging defendant with petty theft based on this evidence. Now, consider the added facts that defendant later told the police that he had gone to Walmart with no intention of stealing anything and only decided to take the items once he was inside the store. Because these facts would support a theory that defendant committed petty theft but *not* shoplifting—that defendant stole items but that he did *not* have the intent to steal the items when he entered the store—section 459.5(b) would *not* have prevented the prosecutor from charging defendant with petty theft instead of shoplifting based on all the evidence." (*Lopez*, at p. 275; footnote omitted.)

The court summarized the rules governing the prosecution's charging discretion: "The general rule—that a prosecutor may charge only shoplifting when there is probable cause that the defendant has committed shoplifting—is subject to just a few narrow exceptions. First, where there is probable cause to support charges of shoplifting *and* second degree burglary (§§ 459, 460) or grand theft (§ 487, subd. (a)), a prosecutor may charge the wobblers of second degree burglary or grand theft instead of shoplifting under a theory supported by the evidence that the property in question is worth more than $950. But in order to return a guilty verdict on either of these charges, the jury must *actually find* the property to be worth more than $950. (See e.g., CALCRIM Nos. 1700, para. 3 [burglary instruction where 'the evidence supports a defense theory that the crime was shoplifting'], 1801 [grand theft]; CALJIC Nos. 14.50, para. 4 [burglary instruction where 'the building entered was a commercial establishment while that establishment was open for business during regular business hours'], 14.32

[grand theft].) Likewise, where there is probable cause to support charges of shoplifting and second degree burglary, a prosecutor may charge second degree burglary instead of shoplifting under a theory supported by the evidence that the defendant did not enter a commercial establishment open during regular business hours. But in order to return a guilty verdict on the burglary charge, the jury must *actually find* that the structure defendant entered was not a commercial establishment or that the defendant entered the commercial establishment outside of its regular business hours. (See e.g., CALCRIM No. 1700, para. 3; CALJIC No. 14.50, para. 4.) In these cases, the jury's determination that the defendant committed second degree burglary or grand theft effectively doubles as a determination that the defendant did *not* commit shoplifting. ¶ Finally, where there is probable cause to support charges of shoplifting and petty theft (§§ 487, 490.2), a prosecutor may charge petty theft instead of shoplifting under a theory supported by the evidence that the defendant formed the intent to steal only after entering the commercial establishment. But petty theft must be charged as a misdemeanor unless the defendant has a prior conviction specified in Proposition 47. (§ 490.2, subd. (a); see § 666, subds. (a), (b).) So, even though a defendant charged with and convicted of petty theft may have *also* committed shoplifting, he may only receive a single misdemeanor conviction for such conduct, provided that he has not suffered any of the relevant prior convictions." (*Lopez*, at pp. 276-277; italics in original; footnote omitted.)

2. **Section 473** (amended) – Forgery [punishment: up to one year in jail]. Section 473(b) provides for misdemeanor treatment if the forgery of a particular commercial document does not exceed $950. Since the statute references "forgery relating to a check, bond," etc., the value limitation relates to the particular instrument, not the accumulated value if multiple documents are forged. (*People v. Hoffman* (2015) 241 Cal.App.4th 1304; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744-745.) It appears the drafters were aware of the distinction since section 476a, regarding checks issued with insufficient funds, makes specific reference to "the total amount of all checks . . ." not exceeding $950. (§ 476a(b).)

"Forgery," for the purposes of Proposition 47, is limited to the types of forgery listed in the statute and thus does not include access card forgery under section 484f(a). "Looking at the plain meaning of the words in the statute, section 473(b) provides forgery will be classified as a misdemeanor when a defendant has used one of seven specific instruments (check, bond, bank bill, note, cashier's check, traveler's check, or money order) valued at $950 or less. Under the maxim of statutory construction '*expressio unius est exclusio alterius*...., " 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.' " ' (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1130, 131 Cal.Rptr.3d 925.) Employing this principle, the specific language

used in section 473(b) means forgery crimes are classified as straight misdemeanors *only* when one of the seven listed instruments is used to commit the crime. (*People v. Martinez* (2016) 5 Cal.App.5th 234, 242–243, 209 Cal.Rptr.3d 480 (*Martinez*).) In all other cases, forgery offenses are wobblers. (§ 473, subd. (a); see *Martinez*, at p. 242, 209 Cal.Rptr.3d 480.)" (*People v. Bloomfield* (2017) 13 Cal.App.5th 649, 652-653.)

Courts were in conflict over the definition of "value" of a forged check. The issue has been resolved by *People v. Franco* (2018) 6 Cal.5th 433, 434: "We must decide how to determine the value of a forged check. Because forgery requires the intent to defraud, and the stated value of the forged check indicates the severity of the intended fraud, we conclude that when the check contains a stated value, that amount is its value for this purpose. We affirm the judgment of the Court of Appeal in this case, which reached a similar conclusion, and disapprove *People v. Lowery* (2017) 8 Cal.App.5th 533, to the extent it is inconsistent with this conclusion."

The determination of value of counterfeit bills does not include unused paper or other materials that could be fashioned into fraudulent bills; value is limited to the face amount of the completed bills. (*People v. Rendon* (2016) 5 Cal.App.5th 422, 426-427.)

Possession of counterfeit currency of less than $950 qualifies as a "bank bill" or "note" for the purposes of section 473 and 475. Such a crime qualifies for relief under Proposition 47. (*People v. Maynarich* (2016) 248 Cal.App.4th 77.) Generally in accord with *Maynarich* are *People v. Smith* (2016) 1 Cal.App.5th 266, and *People v. Mutter* (2016) 1 Cal.App.5th 429.

In *People v. Martinez* (2016) 5 Cal.App.5th 234, defendant was convicted of forging a credit card receipt and was convicted of a felony violation of section 473. His petition for resentencing was denied because the kind of forgery committed by the defendant was not included in the list of offenses covered by Proposition 47. "The plain language of section 473 is clear and unambiguous. Under subdivision (b) of section 473, a forgery conviction is a misdemeanor if the instrument utilized in the forgery is a check, bond, bank bill, note, cashier's check, traveler's check, or money order with a value of $950 or less. If the forgery does not involve one of the seven instruments specified in section 473, subdivision (b), it is a wobbler under subdivision (a) of section 473. Defendant was convicted of a 'receipt for goods' forgery. A receipt for goods is not one of the seven instruments specified in section 473, subdivision (b). Defendant therefore was ineligible to have his 'receipt for goods' forgery conviction designated as a misdemeanor pursuant to section 473, subdivision (b)." (*Martinez*, at p. 241.)

**Exclusion of forgeries related to identity theft**

The amendments to section 473 do not apply to "any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473(b).) The "identity theft" exclusion will only apply when the identity theft is committed in connection with the forgery. "The terms of section 473(b), the statute's overall structure, and the light these shed on the statute's purpose indicate that a connection between 'both' the forgery and identity theft convictions must exist to disqualify an offender from resentencing. (§ 473(b).) To the extent the precise meaning of the statute's terms is somewhat ambiguous, the extrinsic evidence confirms the electorate's intended purpose in approving Proposition 47 was to require that the conduct related to the forgery and identity theft convictions must have been made 'in connection with' each other to preclude Gonzales from resentencing. (*Gonzales*, *supra*, 6 Cal.App.5th at p. 1073, 211 Cal.Rptr.3d 814.)" There must be a "meaningful connection between forgery and identity theft to preclude an offender from being resentenced." (*People v. Gonzales* (2018) 6 Cal.5th 44, 46, 53.) Merely because the convictions occurred in the same proceeding is not sufficient for a "meaningful connection." (*Id*., at p. 54.)

In *People v. Guerrero* (2020) 9 Cal.5th 244 [*Guerrero*], the court addressed a related question: "Does the fact that a defendant possessed separate stolen identification and forged instruments together at the same time provide a sufficient connection between the two offenses to bar him from a sentence reduction pursuant to section 473(b)? We hold that it does not. A meaningful connection between forgery and identity theft for purposes of the identity theft exception requires a facilitative relationship between the two offenses. The mere fact that a defendant possessed two separate items of contraband at the same time does not demonstrate such a relationship." (*Guerrero*, at p. 246.)

In explaining "meaningful connection," *Guerrero* observed: "[C]oncurrent possession, without more, does not establish a meaningful connection between the two offenses for purposes of the identity theft exception. As we said in Gonzales, the identity theft exception does not arbitrarily combine two unrelated crimes; it 'lists two offenses that tend to *facilitate* each other and, committed together, arguably trigger heightened law enforcement concerns.' (Gonzales, supra, 6 Cal.5th at p. 54, 237 Cal.Rptr.3d 193, 424 P.3d 280, italics added.) Although our reference to facilitation in Gonzales was illustrative, we now conclude that it provides the clearest standard rooted in the purpose of Proposition 47 to evaluate whether a meaningful connection between forgery and identity theft exists. To disqualify a defendant for relief under section 473(b), the prosecution must show that the forgery offense facilitated the identity theft offense, or vice versa. The fact that both offenses were committed at the same time and place, or the fact that evidence of both offenses was found at the same

time and place, does not by itself mean that one offense facilitated the other." (*Guerrero*, at p. 250; italics in original.) The court cited examples of conduct sufficient to show facilitation: In *Gonzalez* "we provided a typical example: 'A person who commits forgery by imitating the victim's signature on a check, for example, will often present identification to falsely represent his or her identity.' (Id. at p. 54, 237 Cal.Rptr.3d 193, 424 P.3d 280.) Identity theft may also facilitate forgery in relation to the same instrument. For example, a person may obtain a victim's home address or checking account number to create a forged check." (*Guerrero*, at p. 251.)

The court summarized its holding: "We hold that the meaningful connection requirement of section 473(b)'s identity theft exception is satisfied only if a defendant convicted of forgery is also convicted of identity theft in the same proceeding and only if one of the offenses facilitated the other. The sole fact that a defendant happened to possess two separate items of contraband at the same time does not demonstrate such a facilitative relationship. Simultaneous possession of contraband, without more, does not raise the same law enforcement concerns that the electorate intended to address when it excluded defendants 'convicted both of forgery and of identity theft' from sentencing relief. (§ 473(b).)" (*Guerrero*, at p. 253.)

3. **Section 476a** (amended) – Insufficient Funds [punishment: up to one year in jail]. Section 476a(a) generally punishes the fraudulent use of commercial instruments as a felony, and provides punishment of up to one year in jail, or a sentence under section 1170(h). Section 476a(b), was amended to provide that if the total amount of instruments does not exceed $950, the crime is a misdemeanor, punishable by up to one year in jail. The previous threshold level of $450 was raised to $950. The reduced punishment is not available if the defendant has three or more prior convictions of violating sections 470, 475, 476, or 476a. Previously, section 476a(b) had allowed felony prosecution with only one such prior conviction.

4. **Section 490.2** (new) – Definition of Grand Theft. Section 490.2(a) provides that "[n]otwithstanding Section 487 *or any other provision of law defining grand theft*, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed [$950], shall be considered petty theft and shall be punished as a misdemeanor . . . ." (Italics added.) The new section will be inapplicable to any theft that may be charged as an infraction. (§ 490.2(b).) The new definition will focus on the value of the property taken rather than just the nature of the property taken. For example, theft of any firearm or automobile was grand theft under section 487(d); the theft of any property "from the person" was grand theft under section 487(c). Now, these crimes will be misdemeanors unless the value of the property taken

exceeds $950. The new statute appears to trump statutes which require only a $250 level to constitute grand theft. (See, e.g., § 487(b)(1)(B) – theft of specified agricultural products exceeding $250 in value.)

**Theft of access card information**

Courts were divided on whether Proposition 47 applies to section 484e, prohibiting theft of access cards or account information. Subdivision (d) provides: "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." The issue has been resolved by the Supreme Court in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowsky*), which holds that section 484e is an eligible offense. The court concludes that any specie of grand theft in section 487, or other crimes defining theft, are eligible if the theft is of property less than $950 in value. In the context of section 484e, value is based on the information obtained, not the value of any property that may have been purchased with the information. The proper measure is "the reasonable and fair market value" of the information. (Id., at p. 915.) If there is no legal market for the information, the court must consider potential illicit sales of the information. (*Romanowsky,* at pp.915-916.) The rule "requires courts to identify how much stolen access card information would sell for" on the black market Only if the information has *no* value on any market, legal or otherwise, is it considered de minimis. If the issue of value has been raised in connection with a request for relief under section 1170.18, the defendant has the burden of proving the value of the information is less than $950. (*Romanowsky*. at p. 916.) It may be necessary for the court to conduct a hearing to allow the defendant to meet this burden.

In *People v. Liu* (2019) 8 Cal.5th 253 (*Liu*), the Supreme Court elaborated on the nature of the factors that may be used to establish the value of the stolen information:

> In *Romanowski* we acknowledged the "potential difficulty of putting a price on this property" (id. at p. 911, 215 Cal.Rptr.3d 758, 391 P.3d 633) because the " 'fair market value' of stolen access card information," traded in illicit markets, "will not always be clear" (id. at p. 915, 215 Cal.Rptr.3d 758, 391 P.3d 633). Unlike everyday retail products such as shoes or electronics, or data about human behavior harvested from the online activity of consenting users, unlawfully obtained access card information cannot be bought and sold legally. The utility of such information for obtaining merchandise or services, moreover, tends to be contingent rather than certain. As with the prize money one may glean from an earlier purchased lottery ticket, the ultimate worth of stolen

access card information often depends on facts not known at the time of acquisition. Access card information can nonetheless be sold in illicit markets, and, with disturbing frequency, it is. That there exists no lawful market for this information, and often no clear sense of what it will purchase or for how long, may complicate the calculation of its fair market value. But as we held in Romanowski, any added complication "does not relieve courts of th[e] duty" to make that calculation. (Ibid.) To the contrary, "the possibility of illegal sales" of access card information is a key factor in the analysis — and one that warrants careful attention. (Ibid.)

The possibility of such sales — and ultimately, the value of the stolen access card data — tends to be driven by multiple factors. Consider the credit limit on a credit card or the account balance on a debit card. Assuming the unwitting fraud victim isn't continuing to pay down the credit card balance or replenishing the account balance, these values represent the maximum amount someone possessing stolen access card information could charge to (or withdraw from) the victim's account. The higher the credit limit (or account balance), the more valuable the information — at least if the thief or potential purchaser of the data knows the limit (or balance) when she acquires the access card information. (See Stack, *Here's How Much Your Personal Information Is Selling for on the Dark Web* (Dec. 6, 2017) (Experian) <https://www.experian.com/blogs/ask-experian/heres-how-much-your-personal-information-is-selling-for-on-the-dark-web/> [as of November 19, 2019].)

No matter how high the credit limit or account balance, would-be purchasers are unlikely to pay much for stolen account information unless they believe they can exploit it. So how readily, if at all, stolen access card information can be used matters. Someone will find it easier to make unauthorized charges if she has not just the card number and expiration date, but also the security code on the back (what's sometimes called a CVV2 code) and the card's billing ZIP code. One might thus place a premium on more detailed access card information, even if the relevant credit limit (or account balance) is lower. (Experian, *supra*; Franklin et al., An Inquiry into the Nature and Causes of the Wealth of Internet Miscreants (2007) Online Credentials and Sensitive Data, p. 11 (Franklin)<http://www.icir.org/vern/papers/miscreant-wealth.ccs07.pdf> [as of November 19, 2019].)

But even such detailed information may not squelch fully the perils inherent in buying stolen access card information. Such buyers bear the risk that their purchase will become — or already is — useless. Stolen

credit and debit cards often get frozen or canceled, particularly when a cardholder or their financial institution catches a whiff of fraud. The value of stolen access card information may typically be discounted to account for these risks. And by that same principle, freshly stolen access card information may fetch a higher price than stale information because it is more likely to be active. (*Franklin*, *supra*, at p. 11; Ablon, et al. Markets for Cybercrime Tools and Stolen Data (2014) p. 11 (RAND) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR610/RAND_RR610. pdf> [as of November 19, 2019].)

The dynamics of supply and demand matter for illegal markets, too, just as they do for legal ones. (*Experian*, *supra*; *Franklin*, *supra*, Inferring Global Statistics and Trends, at p. 12.) Suppose a hacker successfully attacks a major retailer and then puts information related to thousands of access cards up for sale online. The resulting supply glut may reduce (at least for a time) the illegal market price of comparable stolen access card information. (See RAND, *supra*, at p. 8.) In other words, the value of stolen access card information depends in no small part on how much comparable information is available on the illegal market — and how many people are looking to buy it. (See Black's Law Dict. (10th ed. 2014) p. 1785 [describing a "fair market value" as "the point at which supply and demand intersect"].)

These factors don't cover the waterfront of what a court may consider in determining whether a defendant's proposed valuation of stolen access card information is objectively reasonable. Nor do they encompass all of the methods useful in discerning the value of stolen access card information. But they demonstrate that the inquiry Romanowski requires for determining the severity of a section 484e(d) offense — assessing how much the stolen access card information in question would sell for — is a nuanced endeavor.

The inquiry is nonetheless eminently feasible. Where the facts otherwise presented to the trial court don't already offer some bearing on this question, the best place to start may be consulting, perhaps with help from an expert witness, the current trends in illicit markets for stolen access card information and the prevailing price of illegally obtained comparable information. (See Peretti, Data Breaches: What the Underground World of "Carding" Reveals (2008) 25 Santa Clara Computer & High Tech. L.J. 375, 381–389, 412 [describing sophisticated online illegal market for stolen access card information]; *Franklin, supra*, at p. 1 [similar]; *cf.* People v. Tijerina (1969) 1 Cal.3d 41, 45, 81 Cal.Rptr. 264, 459 P.2d 680 [noting "that the price charged by a retail store from which merchandise is stolen" is ordinarily "sufficient to establish the

value of the merchandise" because it tends to "accurately reflect the value of the merchandise in the retail market"].) Such an expert might help identify what considerations are relevant to the fair market value analysis in any given case. (*Liu*, at pp. 259-261; footnote omitted.)

In *Romanowski*, we required a straightforward, if somewhat nuanced, analysis from courts assessing the reasonable and fair market value of stolen access card information. Courts must assess how much such information would sell for, even though it cannot be sold legally. In conducting that inquiry, the value of what a defendant obtained using stolen access card information may be somewhat relevant. But if so, it must be considered along with potentially more probative pieces of the pricing puzzle, such as: (1) the access card's credit limit or the account balance, if knowable when the defendant engages in the acquisition or retention of information that serves as the basis for criminal liability under section 484e(d); (2) the amount of account information possessed by the defendant; (3) how much the value of the information has been diminished because of its sale in illicit markets; (4) how recently the information was stolen; and (5) the prevalence of comparable information on the illicit market. (*Liu*, at p. 263.)

**Vehicle crimes**

Appellate courts were in conflict on the question of whether section 490.2 includes vehicle thefts charged under Vehicle Code, section 10851. *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), resolves the issue: it does include theft of vehicles.

"[A] person serving a sentence for grand theft under Penal Code section 487 or another statute expressly defining a form of grand theft (e.g., Pen. Code, §§ 484e, 487a, 487i) is clearly eligible for resentencing under section 1170.18 if he or she can prove the value of the property taken was $950 or less. (See *People v. Romanowski* (2017) 2 Cal.5th 903, 910-914 (*Romanowski*) [defendant convicted for theft of access card information under Penal Code section 484e eligible for resentencing].) This means that a person serving a sentence for conviction of grand theft of an automobile (Pen. Code, § 487, subd. (d)(1)), for example, could seek resentencing under section 1170.18 if the vehicle taken was worth $950 or less." (*Page*, *supra*, 3 Cal.5th at p. 1182.)

The court noted that Vehicle Code, section 10851 includes two kinds of offenses: the theft of a vehicle or the driving of a vehicle without the owner's consent. "By its terms, Proposition 47's new petty theft provision, section 490.2, covers the theft form of the Vehicle Code section 10851 offense. As noted, section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who

'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' (*People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1288, rev. granted June 14, 2017, S241574 (*Van Orden*).)" [¶] For those who, like defendant, were already serving felony sentences when Proposition 47 was passed, section 1170.18, subdivision (a), authorizes resentencing if the defendant 'would have been guilty of a misdemeanor' had Proposition 47 been in effect at the time of the offense for which resentencing is sought. A defendant convicted of a felony for stealing a vehicle worth $950 or less (before Proposition 47's passage) would have been guilty only of a misdemeanor had section 490.2 been in effect at the time. This is true regardless of whether the conviction was obtained under Penal Code section 487, subdivision (d)(1), or Vehicle Code section 10851, subdivision (a). As we explained in [*People v. Garza* (2005) 35 Cal.4th 866,] 871, '[A] defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession' has been convicted of stealing the vehicle. It follows that Proposition 8 makes some, though not all, section 10851 defendants eligible for resentencing: a defendant convicted and serving a felony sentence under Vehicle Code section 10851, subdivision (a), for vehicle theft—taking a vehicle with the intent to permanently deprive the owner of possession—could (if the vehicle was worth $950 or less) receive only misdemeanor punishment pursuant to section 490.2 and is thus eligible for resentencing under section 1170.18." (*Page*, at pp. 1183-1184; italics in original.)

*Page* expressly rejected the contention that to be included in section 490.2, a crime must specifically define a species of grand theft. "In its central ameliorative provision, section 490.2, subdivision (a), mandates that 'obtaining any property [worth $950 or less] by theft . . . shall be considered petty theft and shall be punished as a misdemeanor.' The subdivision's opening clause—'Notwithstanding Section 487 or any other provision of law defining grand theft'—does not limit the provision's ameliorative operation, but instead saves that operation against interference from other statutory provisions defining certain conduct as grand theft. To be sure, the fact that the opening clause does not mention Vehicle Code section 10851 may suggest its drafters did not have that statute specifically in mind as a potential source of conflict. (Cf. *Romanowski*, *supra*, 2 Cal.5th at p. 908 [noting that the 'notwithstanding' clause was evidently aimed at 'various . . . theft provisions' that 'carved out separate categories of grand theft based on the type of property stolen, with either a lower value threshold or no value threshold at all'].) Nevertheless, section 490.2 plainly indicates that 'after the passage of Proposition 47, "obtaining any property by theft" constitutes petty theft if the stolen property is worth less than $950." ' (*Romanowski*, at p. 908.) Nothing in the operative language of the

subdivision suggests an intent to restrict the universe of covered theft offenses to those offenses that were expressly designated as 'grand theft' offenses before the passage of Proposition 47. On the contrary: 'Omitting the opening clause does not alter the meaning of the remainder of the sentence; the independent clause containing the definition of petty theft stands on its own and means what it says—the act of "obtaining any property by theft where the value . . . does not exceed nine hundred fifty dollars ($950)" constitutes petty theft and must be charged as a misdemeanor.' (*Van Orden*, *supra*, 9 Cal.App.5th at p. 1291, rev. granted.)" (*Page*, at p. 1186.)

"Consistent with that straightforward reading of the statutory text, we conclude that obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged. A defendant who, at the time of Proposition 47's passage, was serving a felony sentence for taking or driving a vehicle in violation of Vehicle Code section 10851 is therefore eligible for resentencing under section 1170.18, subdivision (a), if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Page*, at p. 1187.)

Because the record did not disclose whether the violation of section 10851 was by theft or driving without the consent of the owner, the court denied the petition for resentencing without prejudice to bringing a new motion. "A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility. (*Romanowski*, *supra*, 2 Cal.5th at p. 916; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880.) To establish eligibility for resentencing on a theory that a Vehicle Code section 10851 conviction was based on theft, a defendant must show not only that the vehicle he or she was convicted of taking or driving was worth $950 or less (§ 490.2, subd. (a)), but also that the conviction was based on theft of the vehicle rather than on posttheft driving (see *Garza*, *supra*, 35 Cal.4th at p. 871) or on a taking without the intent to permanently deprive the owner of possession (see *People v. Riel* [(2000) 22 Cal.4th 1153,] 1205)." (*Page*, *supra*, 3 Cal.5th at p. 1188.)

In *People v. Bullard* (2020) 9 Cal.5th 94 (*Bullard*), the Supreme Court held persons who are charged with a violation of Vehicle Code, section 10851, where the value of the vehicle does not exceed $950, are entitled to the benefits of Proposition 47 whether the taking was temporary or with the intent to permanently deprive the own of possession. As observed by the court at page 106: "The narrow interpretation of Penal Code section 490.2 as applied to section 10851 convictions would mean that a person who intends *only* to take the vehicle temporarily may be punished as a felon, while a person

who *also* intends to take the vehicle permanently is subject only to misdemeanor punishment. The utter illogic of this result effectively eliminates the narrow interpretation of Penal Code section 490.2 as a possible construction. As in other instances when a statute 'blindly and literally applied' would lead to 'obvious injustice and a perversion of the legislative purpose' (People v. Oliver (1961) 55 Cal.2d 761, 766, 12 Cal.Rptr. 865, 361 P.2d 593), we must instead choose a reasonable interpretation that avoids absurd consequences that could not possibly have been intended. (See, e.g., People v. Franco (2018) 6 Cal.5th 433, 438, 240 Cal.Rptr.3d 766, 430 P.3d 1233 [applying this rule to interpret Prop. 47]; see also, e.g., Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299 [applying the same rule]; Bruce v. Gregory (1967) 65 Cal.2d 666, 674, 56 Cal.Rptr. 265, 423 P.2d 193 [same].)" (Italics in original; footnote omitted.)

The court summarized its holding: "Under our holdings in Page, Lara, and this case, Proposition 47's substantive effect on section 10851 can be summarized as follows: Except where a conviction is based on posttheft driving (i.e., driving separated from the vehicle's taking by a substantial break), a violation of section 10851 must be punished as a misdemeanor theft offense if the vehicle is worth $950 or less. In pre-Proposition 47 cases, where the defendant seeks resentencing or redesignation under Penal Code section 1170.18, the defendant bears the burden of proof to show the relevant facts; in cases arising, tried, or sentenced after Proposition 47 came into effect, the People bear that burden. (Lara, supra, 6 Cal.5th at pp. 1135–1137, 245 Cal.Rptr.3d 426, 438 P.3d 251; Page, supra, 3 Cal.5th at pp. 1187–1189, 225 Cal.Rptr.3d 786, 406 P.3d 319.)" (*Bullard*, *supra*, 9 Cal.5th at p. 110.)

Proposition 47 does not apply the crime of attempted auto burglary. (*People v. Acosta* (2015) 242 Cal.App.4th 521.) It is likely that in light of *Page*, *Acosta* has no further validity.

The jury must be instructed that to convict a defendant of felony vehicle theft, the value of the vehicle must be over $950. "Under People v. Page (2017) 3 Cal.5th 1175, 225 Cal.Rptr.3d 786, 406 P.3d 319 (Page), which was not decided until after the trial in this case, a defendant cannot be convicted of a felony violation of section 10851(a) based on the *theft* of a vehicle unless the vehicle is worth more than $950. Since the jury here was not so instructed, it could have relied on a legally invalid theory to convict Jackson." (*People v. Jackson* (2018) 26 Cal.App.5th 371, 373 [italics in original].) Generally in accord with *Jackson* is *People v. Martell* (2019) 42 Cal.App.5th 225.

*People v. Zorich* (2020) 55 Cal.App.5th 881 (*Zorich*), holds the trier of fact may consider the Kelly Blue Book in determining the value of a vehicle. "Because the issue here is the value of the vehicle, defendant was required to submit relevant

evidence regarding the value of a 1979 vehicle in 1997. Absent a cost-prohibitive expert opinion, the Kelly Blue Book pages are probably the most probative evidence a defendant could be reasonably expected to produce. Such a source is admissible over a hearsay objection (although there was no such objection in this case) "if the compilation is generally used and relied upon as accurate." (Evid. Code, § 1340.) Courts have recognized the Kelley Blue Book is 'a widely accepted source' for the value of vehicles. [Citation.] The fact that such documents were outside the record of conviction does not preclude their use in a Proposition 47 petition. [Citation.] Accordingly, we find the Kelley Blue Book valuation was relevant, admissible evidence." (*Zorich*, *supra*, 55 Cal.App.5th at pp. 887-888.) The court also found admissible the statements in a police report about the condition of the vehicle and the odometer reading. (*Id*., at p. 888.)

With respect to admissible evidence generally, *Zorich* observed: "We do not hold today that simply anything will do as evidence of value. The trial court must have some relevant, admissible, probative evidence. (Evid. Code, §§ 210, 350, 351.) But as both a practical matter and a policy one, when it comes to determining the value of long ago stolen property under Proposition 47, we cannot allow the perfect to be the enemy of the good. The voters adopted this initiative, which not only included prospective changes to the law of grand theft, but the opportunity for resentencing on earlier offenses. As courts have come to realize, records from the original proceedings will rarely contain much, if any, evidence of monetary value of the stolen property. In most cases, it was simply not an issue at the time of the original trial or plea agreement. [¶] The courts should not frustrate the voters' intent by making it impossible to reduce convictions under Proposition 47 by adopting an unobtainable standard of evidence; indeed, courts have already recognized that defendant need establish value under the preponderance standard. [Citation.] In some cases, the only available evidence will be sources such as the Kelley Blue Book and police reports from the original case, which, along with some reasonable inferences, can be taken together to reach a reasonable approximation of the value of the stolen property. Particularly when uncontradicted, trial courts should find such evidence sufficient to meet the petitioner's burden. Otherwise, the relief promised by Proposition 47 for old theft offenses will be rendered entirely illusory. Prosecutors, of course, are certainly free to submit their own evidence, to object to the petitioner's evidence, and to truly contest the issue before the trial court. But a baldfaced assertion as to value, based on unknown sources of reasoning, should not be enough to rebut a reasonable showing by the petitioner." (*Zorich*, *supra*, 55 Cal.App.5th at pp. 889-890.)

**Valuation, generally**

*People v. Grant* (2020) 57 Cal.App.5th 323 (*Grant*), summarized the principles applicable to the determination of whether stolen property exceeds $950 in

value for the purpose of establishing grand theft. "To establish that Grant committed either grand theft or burglary, the prosecution bore the burden of proving he stole property valued at more than $950. [Citations.] [¶] 'In determining the value of the property obtained, for the purposes of [theft offenses], the reasonable and fair market value shall be the test.' [Citations.] ['section 484 is a definitional section' that 'sets the ground rules for how ... [s]pecific theft crimes ... set out in a variety of other sections' of the Penal Code 'are [to be] adjudicated'] [Citation.] [¶] The fair market value of an item is 'the highest price obtainable in the market place' as between 'a willing buyer and a willing seller, neither of whom is forced to act.' [Citations.] 'Put another way, "fair market value" means the highest price obtainable in the market place rather than the lowest price or the average price.' [Citation.] Fair market value is 'not the value of the property to any particular individual.' [Citation.] [¶] Fair market value may be established by opinion or circumstantial evidence. [Citation.] [testimony of experienced furriers sufficient to establish value of stolen fur pieces] [citation] [testimony by experienced salesclerk sufficient to establish value of stolen suits].) '[T]he price charged by a retail store from which merchandise is stolen" is also 'sufficient to establish the value of the merchandise,' absent proof to the contrary. [Citation.] Jurors may also 'rely on their common knowledge' in determining the value of an item. [Citation.] ['inference by the jurors was not mere speculation, but was instead reasonably based on common knowledge regarding the value of late-model BMW's'].)" (*Grant, supra*, 57 Cal.App.5th at pp. 328-329.)

**Other crimes**

**§ 368 (theft from elder adult):** Section 490.2 does not include the crime of theft from an elder adult under the provisions of section 368. (*People v. Bush* (2016) 245 Cal.App.4th 992; *People v. Soto* (2018) 23 Cal.App.5th 813, 816.

*People v. Baratang* (2020) 56 Cal.App.5th 252, 262, holds he $950 requirement in section 368, subdivision (d)(1), applies to a felony violation of section 368, subdivision (d), based on identity theft.

**§ 503 (embezzlement):** Section 490.2 includes the crime of embezzlement of less than $950 under section 503. (*People v. Warmington* (2017) 16 Cal.App.5th 333.) "Following [*People v. Gonzales* (2017) 5 Cal.5th 858] and [*People v. Romanowski* (2017) 2 Cal.5th 903], it is clear that section 503 defines a form of theft that is covered by section 490.2. As the Supreme Court noted in *Romanowski*, section 503 and the theft statute, section 484, use identical language in defining the offenses. Any doubt that embezzlement is a form of theft is resolved by section 490a, as interpreted in *Gonzales*. While section 503 does not define a form of grand theft, it nonetheless defines a form of theft. Since section 490.2 applies to 'obtaining any property by theft where the value

of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950)' (§ 490.2, subd. (a)), it applies to section 503." (*Warmington*, at pp. 337-338.)

**§ 530.5 [identify theft]:** The crime of shoplifting under section 459.5 includes identity theft under section 530.5, subdivision (a). (*People v. Gonzales* (2017) 2 Cal.5th 858, 876; *People v. Washington* (2018) 23 Cal.App.5th 948, 954.)

In *People v. Jimenez* (2020) 9 Cal.5th 53 (Jimenez), the Supreme Court held the crime of shoplifting under section 459.5 does not include the crime of misuse of personal identifying information under section 530.5. "[W]e conclude that section 459.5 does *not* encompass misuse of identifying information. The preclusive language of section 459.5, subdivision (b) — that '[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting,' and '[n]o person who is charged with shoplifting may also be charged with theft or burglary of the same property' — applies only as to theft or burglary offenses. Section 530.5, subdivision (a) does not define such an offense." (*Jimenez*, at p. 61; italics in original.)

The court further explained its decision in relationship to *Gonzales*: "Jimenez . . . argues that *Gonzales* stands for the proposition that whenever a defendant's conduct constitutes shoplifting, it can only be charged as shoplifting. [¶] This argument misses the mark. *Gonzales* resolved a different question: whether a defendant was eligible for misdemeanor shoplifting resentencing under Proposition 47 when his conviction was for burglary based on a course of conduct involving entering a store to cash a fraudulent check. Our decision in *Gonzales* explained that the defendant was eligible for resentencing on those facts because of what was essentially a perfect overlap between the charged burglary and the facts that would have supported the shoplifting charge: The course of conduct rested on precisely the same entry, with the same intent, to take the same property, as would have supported a shoplifting charge. So Proposition 47's mandate that '[a]ny act of shoplifting ... be charged as shoplifting' and '[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property' applied with full force. When we explained that a 'defendant must be charged only with shoplifting when the statute applies' (*Gonzales*, *supra*, 2 Cal.5th at p. 876, 216 Cal.Rptr.3d 285, 392 P.3d 437), what we meant is simply that a person whose conduct constitutes shoplifting could not be charged with burglary or a theft crime for that same conduct instead of shoplifting, as occurred in *Gonzales*. It does not follow that similar conduct, including conduct that fulfills the elements of the misuse of personal identifying information under section 530.5, subdivision (a), must always be charged only as shoplifting, even if no conviction for burglary or theft — the only crimes barred under section 459.5, subdivision (b) — is at issue. In

fact, no conviction for personal identifying information misuse even occurred in *Gonzales*." (*Jimenez*, *supra*, 9 Cal.th at pp. 68-69.)

*People v. Weir* (2019) 33 Cal.App.5th 868 (*Weir*) holds the Act does not apply to identity theft charged under section 530.5, and particularly subdivisions (c)(1) or (2), because the defined crimes are not theft offenses. "Although a violation of section 530.5 is commonly referred to as identity theft, the plain language of the statute designates a violation of this section a nontheft offense. The statute prohibits a person from acquiring, retaining, or using information, rather than taking it, an indicator that the Legislature was concerned with possession or use rather than with theft. Moreover, a violation of section 530.5 does not require the offender to take or possess another's *property*; it simply proscribes that person from retaining *information.* It also lacks a numerical threshold distinguishing misdemeanor from felony offenses, unlike many theft statutes that distinguish between grand and petty theft. (See, e.g., §§ 486–488.) Finally, section 530.5 also does not explicitly categorize the crime as theft or grand theft, defining the crime instead as a 'public offense.' " (*Weir*, at pp. 873-874; italics in original.) *Weir* has been granted review by the Supreme Court.

5. **Section 496** (amended) – Receiving Stolen Property [punishment: up to one year in jail]. If the value of the property received does not exceed $950, section 496(a) specifies the crime is a misdemeanor. Previously section 496(a) gave the district attorney the *discretion* to charge the crime as a misdemeanor if the property did not exceed $950; now the district attorney *must* charge the crime as a misdemeanor if the value of the property does not exceed $950.

Courts were in conflict regarding the application of Proposition 47 to receiving a stolen vehicle under section 496d. The Supreme Court resolved the conflict in *People v. Orozco* (2020) 9 Cal.5th 111 (*Orozco*). " '[W]e generally presume that the electorate is aware of existing laws.' (*People v. Romanowski* (2017) 2 Cal.5th 903, 909, 215 Cal.Rptr.3d 758, 391 P.3d 633, citing *In re Lance W*. (1985) 37 Cal.3d 873, 890 & fn. 10, 210 Cal.Rptr. 631, 694 P.2d 744.) We therefore presume it was aware of section 496d when it approved Proposition 47. Proposition 47 only amended section 496(a) to reduce receipt of stolen property valued at $950 or less to a misdemeanor. If the electorate had intended to reclassify section 496d offenses as well, it could have done so in the same way that it did in amending section 496(a). It also could have created a new misdemeanor sentencing provision governing all receipt of stolen property offenses, akin to the misdemeanor sentencing provision governing petty theft in section 490.2, which, as discussed below, reclassified offenses for theft of property valued at $950 or less into the offense of petty theft. But the electorate did not do so. Based on this straightforward reading, Orozco's section 496d conviction is not eligible for a sentence reduction under Proposition 47." (*Orozco*, at pp. 118-119.)

*Orozco* expressly disapproved *People v. Wehr* (2019) 41 Cal.App.5th 123, and *People v. Williams* (2018) 23 Cal.App.5th 641, to the extent they held Proposition 47 was applicable to crimes prosecuted under section 496d if the value of the vehicle was less than $950.00. (*Orozco*, at p. 122.)

The value of the stolen property for the purposes of determining eligibility under Proposition 47 is its fair market value as discussed in *People v. Romanowski* (2017) 2 Cal.5th 903.

*Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, 918-919, elaborates on *Romanowski's* definition of "fair market value:" "While *Romanowski* approved the use of illegal sales or an illegal market to determine the value of stolen access card information, it did not purport to limit evidence to that category. The basic question is simply fair market value, which has been defined as the highest price obtainable in the marketplace. (See *Romanowski*, *supra*, 2 Cal.5th at p. 915, 215 Cal.Rptr.3d 758, 391 P.3d 633, citing *People v. Tijerina* (1969) 1 Cal.3d 41, 45, 81 Cal.Rptr. 264, 459 P.2d 680 ['In the absence of proof ... that the price charged by a retail store from which merchandise is stolen does not accurately reflect the value of the merchandise in the retail market, that price is sufficient to establish the value of the merchandise'], *People v. Pena* (1977) 68 Cal.App.3d 100, 104, 135 Cal.Rptr. 602 ['When you have a willing buyer and a willing seller, neither of whom is forced to act, the price they agree upon is the highest price obtainable for the article in the open market. Put another way, "fair market value" means the highest price obtainable in the market place'], and CALCRIM No. 1801 ['Fair market value is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.'].) [¶] Here, we have no doubt evidence of the balances in linked accounts could be relevant to fixing the highest price in the marketplace for stolen access cards. Indeed, the value of stolen access cards may very well turn on the amount of money accessible with the card—it stands to reason that the higher the balance in the account, the more valuable the card giving access to that balance. So a court (or perhaps an expert witness) would likely need to know the amount of money available to an illicit buyer in order to place the highest value on access cards in an illegal market."

Defendant was improperly convicted of felony receiving stolen property when the conviction is based on adding the value of property taken from two different stores. The crimes should be separately charged and not aggregated for a single felony on a "concealment" theory. (*People v. Brown* (2019) 32 Cal.App.5th 726, 734.

6. **Section 666** (amended) – Thefts with Prior Convictions. Section 666 is amended to eliminate the crime of "petty with a prior" as to most persons. Section 666 now applies only to persons excluded from Proposition 47 who have previously "been convicted of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368 [elder abuse], auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496," and have served a term of imprisonment for the offense. Now, unless excluded by the initiative, an offender could commit an unlimited number of petty thefts without any exposure to felony prosecution under this section.

Before the enactment of Proposition 47, a petty theft only could be prosecuted as a felony if the person had three or more designated prior theft convictions. The initiative eliminates the requirement of three prior convictions. Now, the excluded offender may be prosecuted under section 666 with only one prior conviction of petty theft, grand theft, elder abuse, auto theft, burglary, carjacking, robbery, or a felony violation of receiving stolen property.

It is also important to note that the exclusion from Proposition 47 in section 666 based on sex registration is different and broader than the exclusions in the rest of the initiative. In prosecutions under section 666, the exclusion includes all persons *required to register* under the Sex Offender Registration Act, not just those persons required to register because of a crime listed in section 290(c). Accordingly, a defendant required to register because of a juvenile adjudication was excluded from the benefits of Proposition 47. The statutory provisions relating to juvenile registration are part of the Sex Offender Registration Act. (*People v. Dunn* (2016) 2 Cal.App.5th 153.) *Dunn* expressly rejected the defendant's claim that the broader exclusion was due to drafting error or resulted in a denial of equal protection. (*Id*., at pp. 156-157.)

While shoplifting under section 459.5 requires the crime to be committed in a commercial establishment, the crime of petty theft with a prior does not. The felony offense of petty theft with a prior theft conviction may be reduced to a misdemeanor petty theft without a showing the crimes were committed in a commercial establishment. (*People v. Sloat* (2017) 10 Cal.App.5th 761.)

*B. Health and Safety Code violations*

Simple possession of most drugs is now a misdemeanor punishable by up to one year in county jail. The possessory offenses include concentrated cannabis, methamphetamine, cocaine, and heroin.

1. **Health & Safety Code, section 11350** (amended) – Possession of designated narcotics [punishment: up to one year in jail]. Section 11350(a) is amended to include section 11054(e), possession of certain depressants, as a

crime with misdemeanor punishment. Unlike the other Proposition 47 code sections which permit prosecution as a "wobbler," if a person is excluded from the benefits of Proposition 47, punishment under section 11350 will be as a straight felony under section 1170(h).

2. **Health & Safety Code, section 11357** (amended) – Possession of concentrated cannabis [punishment: up to one year in jail and/or a fine of up to $500]. Proposition 47 does not amend the penalties for other portions of section 11357 which relate to specified large amounts of marijuana, or possession of marijuana on school grounds.

3. **Health & Safety Code, section 11377** (amended) – Possession of designated narcotics [punishment: up to one year in jail]. Proposition 47 changes the penalty for all possessory offenses listed in section (a) to a straight misdemeanor, unless the offender falls within the purview of an exception. It also eliminates all of the designated offenses in section 11377(b).

A defendant convicted of transportation of drugs under Health and Safety Code section 11379 is ineligible for resentencing under the Act because Proposition 47 did not change the punishment for transportation from a felony to a misdemeanor. (*People v. Martinez* (2018) 4 Cal.5th 647.)

Cultivation of marijuana under Health and Safety Code section 11358 is not eligible for reduction under Proposition 47; such an exclusion does not violate defendant's equal protection rights. (*People v. Descano* (2016) 245 Cal.App.4th 175.)

## V. Petition for Redesignation of a Crime as a Misdemeanor

Proposition 47 adds section 1170.18 to permit eligible persons to petition the court to change a previously sentenced qualified crime as a felony to a misdemeanor. The right to request such a change is given to two groups of persons: (1) persons currently serving such a felony sentence (referred to as persons requesting a *resentencing*); and (2) persons who have completed any sentence imposed by the court (referred to as persons requesting a *reclassification* of the crime). The procedure for resentencing is generally more formal and similar to resentencing under Proposition 36, with a determination of whether the petitioner poses an unreasonable risk of danger to public safety if resentenced. The procedure for reclassification is more informal, potentially done without a court hearing and without any consideration of dangerousness. Section VI reviews the process for resentencing; Section VII reviews the process for reclassification.

## VI. Petition for Resentencing of a Crime as a Misdemeanor (PC §§ 1170.18(a)-(e), (i)-(o))

### *A. Persons who may petition for relief*

Section 1170.18(a) provides: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459a, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended by this Act."

Although a person is currently serving a sentence for a crime that is now a misdemeanor, resentencing must be denied if the person has a prior disqualifying conviction or a prior conviction requiring registration as a sex offender under section 290(c). See full discussion of disqualifying prior convictions in Section III, *supra*.

The petition must be denied whether or not the disqualifying prior conviction was incurred before or after the crime which is the subject of the petition; the disqualifying prior conviction only must occur prior to the filing of the petition for relief. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179; *People v. Montgomery* (2016) 247 Cal.App.4th 1385.) A slightly different timeline is established by *People v. Walker* (2016) 5 Cal.App.5th 872, 879: "We . . . conclude that within the context of Proposition 47, a prior disqualifying conviction is a super strike conviction suffered any time before the court's ruling on an application to have a felony conviction reclassified as a misdemeanor." In accord with Walker is *People v. Casillas* (2017) 13 Cal.App.5th 745, 750.

Although the petitioner has no disqualifying prior conviction, the court may deny the request for relief if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18(b); see full discussion of dangerousness, *infra*.) Assuming a person has no disqualifying prior conviction, or is not determined to be too dangerous to resentence, the following persons will be eligible for relief under section 1170.18(b):

1. Persons currently serving a term in state prison

There can be no dispute that section 1170.18 will be available to any qualified petitioner now in state prison serving a felony sentence for a crime Proposition 47 declares a misdemeanor. (For a discussion of the application of the initiative to persons sentenced as a second or third striker under the Three Strikes law, see Section IX, *infra*.)

2. Persons on Parole or Postrelease Community Supervision (PRCS)

It is clear that persons on parole or PRCS will be entitled to seek relief under Proposition 47 – the only issue is which portion of section 1170.18 is appropriate to employ to request relief. If being on parole or PRCS is considered "currently serving a sentence," the person will be required to petition for relief under sections 1170.18(a) – (e), which will require the court to determine whether the petitioner is unreasonably dangerous to the community before granting the petition. If being on parole or PRCS is *not* a part of the sentence, the sentence will be considered completed and the person is eligible to apply for a reduction to a misdemeanor under sections 1170.18(f) – (h), which does not include a requirement that the judge consider the person's dangerousness. *People v. Pinon* (2016) 6 Cal.App.5th 956, holds the period of parole or PRCS is part of the sentence for the underlying offense – a person on parole or PRCS, therefore, is still serving a sentence for the purposes of section 1170.18(a). (*Id*., at p. 963.)

*Pinon* is consistent with *People v. Nuckles* (2013) 56 Cal.4th 601, 609 (*Nuckles*), which addresses this issue in a different context. *Nuckles* observes that the prison *term* is the actual time served in prison before release on parole, and the day of release marks the end of that term. (*Nuckles*, at p. 608.) It goes on to say, however, that "[a]lthough parole constitutes a distinct phase from the underlying prison sentence, a period of parole following a prison term has generally been acknowledged as a form of punishment. '[P]arolees are on the "continuum" of state-imposed punishments.' (*Samson v. California* (2006) 547 U.S. 843, 850 (*Samson*).) Further, parole is a form of punishment accruing directly from the underlying conviction. As the Attorney General observes, parole is a mandatory component of any prison sentence. 'A sentence resulting in imprisonment in the state prison . . . shall include a period of parole supervision or postrelease community supervision, unless waived . . . .' (§ 3000, subd. (a)(1).) Thus, a prison sentence 'contemplates a period of parole, which in that respect is related to the sentence.' [Citation.]" (*Nuckles*, at p. 609.)

3. Persons sentenced under section 1170(h)

The resentencing provisions of section 1170.18(a) – (e) apply to persons currently serving a sentence to county jail imposed under the provisions of section 1170(h), whether the sentence is a straight term of incarceration or a split sentence containing mandatory supervision. These sentences are considered prison terms for the purposes of enhancement under section 667.5(b). Since to be sentenced under section 1170(h), the defendant must first be denied probation, he is being sentenced in the same manner as a person being sentenced to state prison. Furthermore, there is nothing in Proposition 47 that limits the application of section 1170.18 to persons serving prison terms.

4. Persons on probation

Persons on probation are "currently serving" a sentence and are eligible to petition for relief under Proposition 47. "The parties agree that in passing Proposition 47 the voters intended to embrace probationers within the reach of the resentencing provisions of section 1170.18. To interpret the statutory language otherwise would, in their view, lead to absurd consequences. We find merit in this position. As the People acknowledge, there is nothing in either the ballot materials or the statutory language that appears to limit the phrase 'currently serving a sentence for a conviction' to those serving a term of imprisonment. Defendant points out that granting probation is in some contexts a 'sentencing choice' (see, e.g., Cal. Rules of Court, rule 4.405(6) [' "Sentence choice" means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial'] ). (Cf. *People v. Howard* (1997) 16 Cal.4th 1081, 1084, 68 Cal.Rptr.2d 870, 946 P.2d 828 [referring to court's authority 'at time of sentencing' either to suspend imposition of sentence or impose sentence and suspend its execution]; *In re DeLong* (2001) 93 Cal.App.4th 562, 571, 113 Cal.Rptr.2d 385 ['an order granting probation and suspending imposition of sentence is a form of sentencing'].) Both parties observe that the language of another voter initiative, Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, used the language 'sentenced to probation.' (See *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1034, 131 Cal.Rptr.2d 375 [quoting ballot pamphlet to distinguish conviction from sentence and referring to 'sentence of probation'].)" (*People v. Garcia* (2016) 245 Cal.App.4th 555, 558.) Generally in accord with *Garcia* is *People v. Davis* (2016) 246 Cal.App.4th 127.

*People v. Bastidas* (2017) 7 Cal.App.5th 591, in the context of the firearms restriction and an application for resentencing, also holds a person is "currently serving a sentence" while on probation.

5. Cases on appeal

It is unlikely that Proposition 47 will apply to cases pending on appeal. *People v. Yearwood* (2013) 213 Cal.App.4th 161, in the context of Proposition 36, holds that the resentencing process cannot be utilized while a case is on appeal. "The trial court does not have jurisdiction over a cause during the pendency of an appeal. (*People v. Flores* (2003) 30 Cal.4th 1059, 1064, 135 Cal.Rptr.2d 63, 69 P.3d 979.) A section 1170.126 petition must be filed once the judgment is final and jurisdiction over the cause has been returned to the trial court. Appellant's eligibility for recall of sentence will be determined at that point in time. Section 1170.126(b) contains a 'good cause' exception to the two year filing period. The pendency of appellate proceedings and consequent lack of jurisdiction over the cause in the trial court would necessarily constitute good cause for a filing delay.

Thus, the length of the appellate process will not foreclose prisoners whose judgments were not final on the Act's effective date from obtaining relief to which they may be entitled pursuant to section 1170.126." (*Yearwood*, at p. 177.)

A case is not final until the expiration of the time for petitioning for a writ of certiorari in the United States Supreme Court. " 'In *Pedro T.* we cited with approval a case holding that, for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*In re Pedro T.* (1994) 8 Cal. 4th 1041, 1046, 36 Cal. Rptr.2d 74, 884 P.2d 1022, citing *In re Pine* (1977) 66 Cal. App. 3d 593, 594, 136 Cal. Rptr.718; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230, 84 S.Ct.1814, 12 L. Ed. 2d 822 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)' (*People v. Nasalga* (1996) 12 Cal. 4th 784, 789 n. 5, 50 Cal. Rptr. 2d 88, 910 P.2d 1380.)" (*People v. Vieira* (2005) 35 Cal.4th 264, 305–306.) A petition for writ of certiorari is considered timely if filed with the court within 90 days after entry of judgment of the state court of last resort. (Rules of the U.S. Supreme Court, Rule 13.1.)

6. Juveniles

There is no question that to the extent Proposition 47 reduces certain adult felony offenses to misdemeanors, the reduction applies to juvenile offenses committed after its effective date. "Welfare and Institutions Code section 602 expressly provides that jurisdiction over juveniles who are made wards of the court is premised on the juvenile's violation of *criminal laws.* These criminal laws are contained in the Penal Code and other codes, and they define offenses primarily for purposes of *adult criminal proceedings*. Thus, when the Proposition 47 voters reclassified certain criminal offenses from felonies to misdemeanors, they necessarily reclassified these offenses for juvenile offenders by virtue of Welfare and Institutions Code section 602's correlation of wardship jurisdiction with violations of criminal laws. Indeed, there is no dispute that the Penal Code and Health and Safety Code offenses reclassified by Proposition 47 for purposes of adult criminal proceedings are likewise reclassified for purposes of juvenile wardship proceedings. That is, if a crime is classified as a misdemeanor in the adult system, it is also a misdemeanor in the juvenile system, and the same applies to felony classifications." (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1224; disapproved on other grounds by *In re C.B.* (2018) 6 Cal.5th 118, 130; italics in original.)

The more difficult question is whether the resentencing and reclassification provisions of section 1170.18 are available to juvenile offenders. *Alejandro*

holds that they are available. "We hold that the offense reclassification provisions set forth in section 1170.18 apply to juveniles. Welfare and Institutions Code section 602 provides for a minor to be declared a ward of the juvenile court when the minor commits a crime set forth in the Penal Code and other codes defining criminal offenses primarily in the adult criminal context. The section thereby incorporates the entire body of laws defining criminal offenses as the basis for juvenile wardship jurisdiction. Accordingly, when a criminal offense is reclassified from a felony to a misdemeanor in the adult context—as occurred under Proposition 47—the reclassification likewise applies in juvenile wardship proceedings. By adding section 1170.18 to the Penal Code, the Proposition 47 voters made this felony-to-misdemeanor reclassification available to qualifying offenders on a retroactive basis. Thus, section 1170.18 concerns *the very same offenses* that are incorporated into the juvenile wardship proceedings via Welfare and Institutions Code section 602, and it follows that section 1170.18's offense reclassification provisions are equally applicable to juvenile offenders." (*Alejandro*, at pp.1216-1217; italics in original.)

*B. Procedure for resentencing of a crime*

For persons currently serving a sentence, the resentencing process is defined in sections 1170.18(a) – (e), and (i) – (o). Like the resentencing of third strike offenders under section 1170.126, Proposition 47 contemplates a potential four-step process: (1) the filing of a petition requesting resentencing, (2) an initial screening for eligibility, (3) a qualification hearing where the merits of the petition are considered, and, if appropriate, (4) a resentencing of the crime.

Although the procedure contemplated for persons currently serving a term includes the right to a hearing on the merits if requested by either the petitioner or the prosecution, there is no express requirement that the court hold a hearing in the absence of such a request. The court and counsel should be free to design a resentencing process through stipulations presented to the court without hearing, except as may be required by the parties if there is a particular issue over qualification or dangerousness, or where it may be required to comply with Marsy's Law.

1. <u>The filing of a petition</u>

The petitioner initiates the resentencing process by filing a petition. Nothing in Proposition 47 suggests the court has any *sua sponte* obligation to act on any case without the request of the petitioner.

**Form of petition**

No particular form of petition is specified by the initiative. A number of courts have created forms for optional use by the petitioner. (See, *e.g.,* the court websites for San Diego and Riverside Superior Courts.) The Criminal Justice Services Office of the Judicial Council also has created an optional form. (See Appendix IV.)

The petition may be made orally in open court. (*People v. Amaya* (2015) 242 Cal.App.4th 972.)

The Supreme Court, in *People v. Page* (2017) 3 Cal.5th 1175, 1188, addressed the contents of the petition for relief: "A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility. (*Romanowski*, *supra*, 2 Cal.5th at p. 916; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880.)"

A petition for relief under section 1170.18 may not include a request to reclassify prior felony convictions used to enhance the sentence, at least to the extent the prior convictions were incurred in a different county. The request to reclassify prior convictions must be made in the county where the convictions occurred. (*People v. Marks* (2015) 243 Cal.App.4th 331.)

**Statute of limitations**

The initiative initially provided that the petition must be filed prior to November 5, 2017, unless good cause was shown for a later filing. (§ 1170.18(j).) Proposition 47 does not delineate the scope of the "good cause" requirement. By legislation effective January 1, 2017, section 1170.18(j) has been amended to extend the filing period to November 4, 2022.

Section 1170.126(b) does not define what constitutes "good cause" for a delay in filing a petition for resentencing. In a Proposition 36 case of first impression, *People v. Drew* (2017) 16 Cal.App.5th 253, 257, explained: "The briefs of both parties refer us to case law interpreting section 1382—which contains various time limitations that ensure a defendant receives a speedy trial—suggesting that it may provide at least rough guidance for construing 'good cause' under section 1170.126, subdivision (b). Like section 1170.126, '[s]ection 1382 does not define "good cause" as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for

the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay.' (*People v. Sutton* (2010) 48 Cal.4th 533, 546.) The courts have concluded in other contexts that, when making a 'good-cause' determination, a trial court must consider all of the relevant circumstances of the particular case, 'applying principles of common sense to the totality of circumstances.' (See, e.g., *Stroud v Superior Court* (2000) 23 Cal.4th 952, 969.)" [¶] We recognize that the analogy between section 1382 (which is focused on the state's obligation to timely bringing a person to trial) and section 1170.126 (which focuses on an inmate's obligation to commence the recall petition process) is an imperfect one because they involve entirely different phases of the criminal process. But the analogy may provide some guidance because both statutes are concerned with time limits within which certain actions must be taken and under what circumstances a delay beyond those deadlines should be permitted. Under both, delays beyond the deadlines carry consequences, and 'good cause' functions as a barometer to evaluate the excuse for the delay and decide whether to obviate those consequences." Ultimately the court declined to consider the third factor, finding there was no circumstance where the prosecution could be prejudiced by the late filing of a motion for resentencing. The defendant's explanation for the two-year delay was that he did not understand that he had a right to relief. The appellate court affirmed the trial court's determination that such a reason did not constitute the requisite "good cause."

**Right to counsel**

For a full discussion of the right to counsel in the preparation of the petition, see Section VIII, *infra*.

2. Initial screening of the petition

***Prima facie* basis for relief**

The second step of the process is the screening of the petition for eligibility. Such a review undoubtedly will be based on the court's file, including the petitioner's record of convictions. The court will be able to summarily deny relief based on any petition that is facially deficient. Resentencing may be denied based solely on the fact of a prior conviction of a designated "super strike" or any offense requiring registration as a sex offender under section 290(c). (§ 1170.18(i).) The designated violent felonies are: a "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) (the Sexually Violent Predator Law); oral copulation, sodomy or sexual penetration of a child under 14 and more than 10 years younger than the defendant; a lewd act on a child under 14; any homicide offense, including attempted homicide as defined in sections 187 – 191.5; solicitation to commit murder; assault with a

machine gun on a peace officer or firefighter; possession of a weapon of mass destruction; or any offense punishable by life imprisonment or death. (For a full discussion of the offenses requiring exclusion from the benefits of Proposition 47, see Section III, *supra*.)

The petitioner has the burden of establishing eligibility for relief under section 1170.18, including, as to qualified theft crimes, that the loss to the victim did not exceed $950. (*People v. Page* (2017) 3 Cal.5th 1175, 1188; *People v. Sherow* (2015) 239 Cal.App.4th 875.) The initial screening must be limited to a determination of whether the petitioner has presented a *prima facie* basis for relief. At this level of review, the court should not delve deeply into any factual issues such as dangerousness or the value of any property taken. The petitioner can meet his burden by declaration. "A proper petition could certainly contain at least Sherow's testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination. (*People v. Bradford* (2014) 227 Cal.App.4th 1332, 1341.)" (*Sherow*, at p. 880.) Generally in accord with *Sherow* is *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444.

*People v. Perkins* (2016) 244 Cal.App.4th 129, 137, suggests the defendant's declaration must contain more than a simple statement that the subject property was valued at less than $950: "Defendant did not meet his burden [to provide evidence of eligibility] in this case. Defendant submitted a form that asserted he was convicted for receipt of stolen property and that the value of the property did not exceed $950. But he did not indicate anywhere on the form the factual basis of his claim regarding the value of the stolen property. He did not describe the stolen credit card that provided the basis for the receiving stolen property count or even indicate that the credit card was the sole basis for the conviction. He did not address the trial evidence indicating he also possessed other items along with the credit card, all stolen from the same victim. Nor did he provide citations to the record of conviction that would have directed the superior court to such evidence. The petition provided no information whatsoever on the nature and value of the stolen property to aid the superior court in determining whether defendant is eligible for resentencing. As a result, defendant did not provide the superior court with information that would allow the court to "determine whether the petitioner satisfies the criteria in subdivision (a)." (§ 1170.18, subd. (b).) We conclude defendant's petition did not meet his burden of providing evidence to establish he is eligible for resentencing on his receiving stolen property conviction."

*People v. Washington* (2018) 23 Cal.App.5th 948 (*Washington*), disagrees with *Perkins*. "[W]e emphasize that the issue before us involves 'the initial screening' of a Proposition 47 petition which 'must be limited to a determination of whether the petitioner has presented a *prima facie* basis for relief under section

1170.18.' (Couzens, *supra*, Sentencing California Crimes, § 25.14.) This initial screening is based on a review of the petition itself, generally prepared by the petitioner in pro per, as well as the record of conviction. (*Ibid.*) If the court finds, based on the petition and its review of the record, that there is a prima facie basis for relief, the court should then hold 'a full qualification hearing at which any additional evidence may be received on the issue of eligibility.' (*Ibid.*) Accordingly, we emphasize that at this point in the process we are only addressing what information a petitioner must provide to the court prior to a hearing at which the petitioner and prosecutor may present evidence not otherwise established by the record." (*Washington*, at p. 955.)

"It is unrealistic to expect Proposition 47 petitioners, who are often self-represented either from prison or upon release, to marshal evidence at the initial stage to establish that the stolen property at issue in their convictions did not exceed $950 at the time it was stolen. Once a petitioner has met his initial burden of eligibility, the prosecution is allowed 'the opportunity to oppose the petition by attempting to establish that the petitioning defendant is *ineligible'* for the requested relief. (People v. Johnson (2016) 1 Cal.App.5th 953, 965, 205 Cal.Rptr.3d 246.) 'This may be accomplished ... by rebutting the petitioning defendant's evidence ....' (Ibid.) The prosecution, should it choose to, is much more equipped to do so. [¶] If the prosecution chooses to oppose a Proposition 47 petition on the ground the value of the stolen property exceeds $950, and this fact is not established by the record of the initial plea or conviction, the superior court should then hold an evidentiary hearing at which the value of the property taken may be considered. (Couzens, *supra*, Sentencing California Crimes, § 25:14; *Romanowski, supra*, 2 Cal.5th 903, 391 P.3d 633.) At that stage, it is likely that a petitioner will be afforded counsel who can ably present evidence on the disputed factual issues. (Couzens, *supra*, Sentencing California Crimes, § 25:15 ['Since section 1170.18 allows a person to seek "resentencing" or "reclassification," it would appear the person has a right to counsel in any court proceeding where the merits of the application are considered.'].)" (*Washington*, at p. 957.)

Eligibility does not necessarily mean that defendant was convicted of one of the specific offenses listed in the Act. "As we recently explained, the requirement that resentencing occur 'in accordance with' one of the nine code sections listed in Penal Code section 1170.18(a) does not make resentencing eligibility contingent upon the petitioner having been *convicted* under one of those provisions. (*Page*, *supra*, 3 Cal.5th at p. 1184.) It is illogical to limit Proposition 47-eligible felonies only to convictions under the listed statutes because, as noted above, two of the listed statutes (Penal Code sections 459.5 and 490.2) were themselves created by Proposition 47, 'which means that no defendant could have been serving a felony sentence for these offenses on the initiative's effective date.' (*Page*, at p. 1185; see *People v. Romanowski* (2017) 2 Cal.5th

903, 910.) A 'straightforward reading' of Penal Code section 1170.18(a)'s text led us to conclude in *Page* that defendants convicted of a felony for stealing vehicles worth $950 or less, including under Vehicle Code section 10851 (a provision not listed in Penal Code section 1170.18(a)), are eligible for resentencing because they 'would have been guilty only of a misdemeanor had [Penal Code] section 490.2 been in effect at the time.' (*Page*, at pp. 1187, 1184.)" (*People v. Martinez* (2018) 4 Cal.5th 647, 652; italics in original.)

"In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950. (*Sherow*, *supra*, at pp. 877-878; see also § 1170.18, subd. (a).) The defendant must attach information or evidence necessary to enable the court to determine eligibility. (*Sherow*, *supra*, at p. 880 ['A proper petition could certainly contain at least [defendant's] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination'].)" (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.)

" 'The trial court's decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief.... [Whether] the value of the property defendant stole disqualifies him from resentencing under [section 1170.18] ... is a factual finding that must be made by the trial court in the first instance.' (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892, 188 Cal.Rptr.3d 698.) Evidence to support such a finding may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties. In some cases, the record of a petitioner's conviction may suffice to establish a prima facie case for resentencing. But in others it may not, particularly where there was no reason for either party to fix the value of the property stolen when the plea was taken. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5, 197 Cal.Rptr.3d 743.)" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1263.) In accord with *Perkins* is *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744 [*Bradford* not applicable to determination of value of stolen property under Proposition 47; court may consider the police report].

In holding that the court may consider evidence outside the record of conviction, the court in *People v. Johnson* (2016) 1 Cal.App.5th 953, 966-967, explained: "In support of his position, Johnson suggests that because *Bradford* limits the evidence of eligibility for resentencing to what is found in a record of conviction that preceded the Proposition 36 resentencing proceedings (*Bradford, supra*, 227 Cal.App.4th at pp. 1327, 1338, 174 Cal.Rptr.3d 499), the same limitation should apply in Proposition 47 resentencing proceedings. However, under

Proposition 36, in order to determine eligibility (whether initially or otherwise), the resentencing court need consider only the petitioning defendant's *existing prior convictions*. Ultimate eligibility for resentencing is set forth at section 1170.126, subdivision (e) and requires showings that: the defendant is serving an indeterminate term of life imprisonment imposed pursuant to section 667, subdivision (e)(2) or section 1170.12, subdivision (c)(2) for a conviction of a felony that is not defined as serious and/or violent by section 667.5, subdivision (c) or section 1192.7, subdivision (c) (§ 1170.126, subd. (e)(1)); the defendant's sentence was not based on offenses in section 667, subdivision (e)(2)(C)(i)-(iii) or section 1170.12, subdivision (c)(2)(C)(i)-(iii) (§ 1170.126, subd. (e)(2)); and the defendant has no prior convictions for any of the offenses in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv) (§ 1170.126, subd. (e)(3)). The evidentiary limitation in *Bradford* is arguably reasonable, given that the requirements for establishing eligibility (or ineligibility) under Proposition 36 are based on the defendant's convictions *in existence at the time of the resentencing petition* and, thus, may be reliably ascertained by a review of the record(s) of conviction in most situations. [¶] In contrast, under Proposition 47 the relevant inquiry for purposes of establishing a petitioning defendant's initial eligibility is 'guilt [ ] of a misdemeanor' (§ 1170.18, subd. (a))—which often cannot be established merely from the record of conviction of the felony. This is because, prior to Proposition 47, where a defendant was convicted of certain drug- or theft-related felonies, the facts necessary to establish that the petitioning defendant was guilty either of a misdemeanor added by Proposition 47 or of a felony reduced to a misdemeanor by Proposition 47 likely would have been irrelevant in charging the defendant with the pre-Proposition 47 felony. [Footnote omitted.] Stated differently, since Proposition 47 created misdemeanors either that did not exist previously (e.g., § 459.5 [shoplifting] ) or that were felony offenses with different showings required (e.g., § 496, subd. (a) [receiving stolen property] ), there is no reason to believe that the electorate intended to limit the resentencing court's review to the petitioning defendant's record of conviction. (See Couzens & Bigelow, Proposition 47 "The Safe Neighborhoods and Schools Act," *supra*, § VI.B.2., p. 39 < http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of July 25, 2016] ['there may be circumstances in which additional facts will be required'].) As applicable in the present case involving receipt of stolen property, '[f]or example, it may not be possible from a review of the record [of conviction] alone to determine the value of property taken.' (*Ibid.*)"

The court must give the defendant the opportunity to cure a defective petition if there is a reasonable possibility that any defect can be corrected. "We have concluded elsewhere that section 1170.18 cannot be read to limit the trial court's discretion as the People propose. (*People v. Abarca* (2016) 2 Cal.App.5th 475, 205 Cal.Rptr.3d 888.) The People present neither contrary authority nor any other reason to conclude the trial court was *required* to summarily deny Huerta's

petition because she failed to attach evidence to her petition. We conclude the trial court acted within its discretion to consider evidence contained in court records and to set an evidentiary hearing to establish the facts underlying Huerta's conviction. [¶] Even if the trial court *had* exercised its discretion to consider whether to dismiss Huerta's petition as deficient, it would have been an abuse of discretion to deny her the opportunity to cure the failure through amendment. '[T]he general rule of liberal allowance of pleading amendment' requires the reviewing court to grant leave to amend if there is a 'reasonable possibility' the party can amend the pleading to cure its defects. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387, 272 Cal.Rptr. 387; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1042, 134 Cal.Rptr.2d 260 (*Kong*) ['If there is a reasonable possibility [amendment will] ... cure the defects, leave to amend *must be granted'*], italics added.) The same liberal amendment principles apply in the criminal context. (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, § 242, p. 501 ['The court may order or permit an amendment for any defect or insufficiency [in the accusatory pleading], at any stage of the proceedings']; *People v. Duvall* (1995) 9 Cal.4th 464, 482, 37 Cal.Rptr.2d 259, 886 P.2d 1252 [same for habeas pleadings].)" (*People v. Huerta* (2016) 3 Cal.App.5th 539, 543-544.)

The proper method to cure a defective petition is to file an amended petition. "We have some concern that allowing a defendant whose petition has been denied to file a new petition may interact in unpredictable ways with res judicata and the finality of judgments. We also have some concern that, as time goes on, some defendants may not have enough time to file a new petition by the three-year statutory deadline. (See Pen. Code, § 1170.18, subd. (j).) Conversely, we have some concern that some defendants may unduly delay the filing of a new petition. Allowing the defendant to file an *amended* petition, within a reasonable time to be set by the trial court, lessens these concerns. Thus, without deciding whether we are absolutely required to do so, we choose to do so as our disposition." (*People v. Sweeney* (2016) 4 Cal.App.5th 295, 303; see also *People v. Pak* (2016) 3 Cal.App.5th 1111, 1121.)

"In view of the initiative's purposes and provisions, as well as the long-standing policy of resolving litigation on the merits, we construe section 1170.18 as conferring discretion on the trial courts to grant Proposition 47 petitioners leave to amend their petitions." (*People v. Bear* (2018) 25 Cal.App.5th 490, 500.)

The initial screening of the petition for resentencing is similar to the initial screening of a petition for writ of habeas corpus. (*People v. Sledge* (2017) 7 Cal.App.5th 1089.) California Rules of Court, Rule 4.551(f) provides that "[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the

petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact."

To properly rule on the petition, the court should request a copy of the petitioner's criminal record from the district attorney, the probation department, or CDCR. While most initial screenings may be accomplished with a review of the petitioner's record, there may be circumstances in which additional facts will be required. For example, it may not be possible from a review of the record alone to determine the value of property taken. If, however, the record review of the petition states a *prima facie* basis for granting relief, the court should grant the petitioner a full qualification hearing at which any additional evidence may be received on the issue of eligibility.

The right of the petitioner to participate in the initial screening of a petition brought under section 1170.126 is discussed in *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 3-4: "[Section 1170.126] accords [a petitioner] the right to a *resentencing hearing* only upon a showing that he is *eligible*. It is not a right to a hearing on the issue of eligibility, followed by the hearing on whether he would present a risk of danger to the public if resentenced. . . . [¶] [E]eligibility is *not* a question of fact that requires the resolution of disputed issues. The *facts* are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337, 1339 (*Bradford*).) What the trial court decides is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility. Therefore, this is not analogous to a hearing on a petition for habeas corpus. [¶] Finally, due process does not command a *hearing* on the threshold criteria that establish entitlement to resentencing. In a context more analogous than a petition for habeas corpus, it does not violate the due process rights of parties in a dependency proceeding for a juvenile court to refuse to hold *any* hearing on a motion for modification (Welf. & Inst. Code, § 388) unless there are allegations adequate to establish a prima facie showing of the necessary criteria of changed circumstances and benefit to the minor; nor is the court obliged to hold an *evidentiary* hearing even upon a prima facie showing, as opposed to entertaining argument as to whether the allegations establish the right to relief. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463 [right of due process compels hearing only after prima facie showing of changed circumstances]; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1339-1340 [due process does not require evidentiary hearing on motion]; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891 [leaving to court the determination of prima facie showing does not violate due process].) [Footnote omitted.] [¶] Similar to the limited reach of due process in the context of modification petitions, we recently held that the parties to a section 1170.126 proceeding are entitled to a limited

"additional procedural protection[]" of their right under due process to be heard (*Bradford*, *supra*, 227 Cal.App.4th at p. 1337.) The petitioner has a right to provide 'input' in the form of briefing 'if the petitioner has not addressed the issue [of eligibility in the petition] and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here)'; the People also have the right to submit a brief in response if the trial court sets a hearing on dangerousness (indicating that it made a preliminary determination of eligibility) in order to highlight facts in the record they assert establish ineligibility. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1340, 1341.)" (Italics in original.)

Caution must be used in the court's consideration of information received from CDCR beyond the record of conviction. Ex parte consideration of certain material may be contrary to sections 1203, 1204 and 1204.5. (*In re Calhoun* (1976) 17 Cal.3d 75; *In re Hancock* (1977) 67 Cal.App.3d 943.) The court may be restricted from considering such information except in the context of an actual sentencing proceeding.

**Gang-related crimes**

*People v. Sweeney* (2016) 4 Cal.App.5th 295, discusses the role of a gang enhancement under section 186.22 in determining a defendant's eligibility for resentencing. Defendant was convicted of 10 felony counts, each of which included a gang enhancement under section 186.22(b). Two of the counts alleged receiving stolen property; he petitioned for resentencing of these counts. The trial court's denial of the petition was reversed. The appellate court determined that notwithstanding the gang allegations, defendant remained statutorily eligible for resentencing. The defendant admitted the crimes and gang enhancements under section 186.22(b). The People argued that because of his gang involvement, defendant would have been guilty of a felony under section 186.22(d) even had Proposition 47 been in effect. The court observed, however, that the alternative sentencing provisions of section 186.22(d) were not alleged. Accordingly, the convictions were for a straight felony and not a felony wobbler as a result of the alternative sentencing provisions. (*Sweeney*, at pp. 301-302.)

**Original sentencing judge**

The petition must be heard by the judge who did the original sentencing, unless the judge is not available. (§ 1170.18(a).) If the original judge is not available, the presiding judge must designate another judge to hear the petition. (§ 1170.18(l).) As with Proposition 36 for three strikes cases, the parties may waive this requirement and another judge may hear the matter, such as a judge designated to hear all of these petitions for the court. The waiver must occur

prior to any judicial involvement. (See *People v. Superior Court (Kaulick)*(2013) 215 Cal.App.4th 1279, 1300 - 1301.)

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5(p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial'].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion." (*Rodriguez*, at pp. 690-691.)

**No pleading and proof requirement**

There is no express pleading and proof requirement to disqualify a petitioner from the resentencing provisions of section 1170.18. (For a full discussion of the "plead and prove" requirement, see Section III(C), *supra*; see Proposition 36 cases: *People v. Elder* (2014) 227 Cal.App.4th 1308, 1315-1316; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1333; *People v. Guilford* (2014) 228 Cal.App.4th 651.) As a practical matter, however, the prosecution has the burden of proving that the defendant should be excluded from resentencing. (See discussion, *infra*.)

3. The qualification hearing

The third step of the process, if necessary, is the qualification hearing where the court will consider the merits of the petition. Nothing in Proposition 47 expressly requires a hearing, but one may be necessary to resolve issues of eligibility or to meet the interests of a victim. The hearing will have two phases: a confirmation of the petitioner's eligibility for relief and, if he is otherwise eligible, a determination of whether resentencing will pose an unreasonable risk of danger to public safety. (§ 1170.18(b).) "Section 1170.18 . . . provides a two-step mechanism.... First, the trial court must determine if the petitioner is eligible for resentencing under section 1170.18 based on a preponderance of the evidence. [Citations.] If the court finds the petitioner eligible, the trial court must determine the factual issue of whether the petitioner presents an unreasonable risk of danger to public safety if resentenced." (*People v. Bush* (2016) 245 Cal.App.4th 992, 1001.)

Because section 1170.18 does not specify a time of hearing, it should be set within a "reasonable time." The petitioner, the prosecution, and any victim who requests it, have the right to notice of, and to appear at, any hearing held in connection with the qualification and resentencing procedure. (See Proposition 36 cases: *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144.)

**a. Confirmation of eligibility**

The first phase of the qualification hearing will be to confirm that (a) the petitioner meets the statutory requirements for relief in terms of having committed a qualified offense and (b) to determine whether there is any statutory disqualification under section 1170.18(i). In other words, the court should determine if the conviction is for a crime covered by Proposition 47 and, as to theft offenses, whether the value of the stolen property does not exceed $950. The court must also determine whether the petitioner has been convicted of any disqualifying crimes listed in section 667(e)(2)(C)(iv) or a crime requiring

registration as a sex offender under section 290(c). (§ 1170.18(b) ["Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a)."].) The burden of proof for an exclusion from the benefits of Proposition 47 is on the People by a preponderance of the evidence. (See *People v. Osuna* (2015) 225 Cal.App.4th 1020, 1040 [Proposition 36 case].)

The petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18(a): *i.e.*, whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under sections 459.5, 473, 476a, 490.2, or 496, the petitioner will have the additional burden of proving the value of the property did not exceed $950. "A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility. (*Romanowski*, *supra*, 2 Cal.5th at p. 916; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879–880.)" (*People v. Page* (2017) 3 Cal.5th 1175, 1188; see also *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444.)

The nature of the evidentiary hearing, as explained in *People v. Sledge* (2016) 7 Cal.App.5th 1089, contrasts Propositions 36 and 47: "An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754, 150 Cal.Rptr. 778, 587 P.2d 220 (*Arbuckle*); *People v. Lamb* (1999) 76 Cal.App.4th 664, 683, 90 Cal.Rptr.2d 565 (*Lamb*); see also § 1170, subd. (b) [sentencing court can consider probation report].) [¶] Like Proposition 36, the burden of proving a disqualifying prior conviction is on the People by a preponderance of the evidence. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040, 171 Cal.Rptr.3d 55 (*Osuna*).) Unlike Proposition 36, 'the trial court is not limited to the record of conviction in its consideration of evidence to adjudicate eligibility for resentencing under Proposition 47.' ([*People v. Johnson* (2016) 1 Cal.App.5th 953,] 967, 205 Cal.Rptr.3d 246, fn. omitted.) 'While the petitioning and resentencing procedures under Proposition 36 and Proposition 47 appear similar (compare § 1170.126 with § 1170.18), *what must be shown initially in support of the petition* under each proposition is not. Thus, the potential sources of evidence to support the petition under each proposition are not the same. For this initial burden under Proposition 47, a petitioning defendant is entitled to present evidence of facts *from any source* to establish the guilt of the Proposition 47–sanctioned misdemeanor. [Citations.]' (*Id*. at p. 968, 205

Cal.Rptr.3d 246.) Likewise, the prosecution is entitled to produce evidence of facts from any source to establish a disqualifying prior conviction." (*Sledge*, supra, at p. 1095; italics in original.)

The petitioner is not entitled to a jury determination of value of stolen property for the purposes of determining eligibility for resentencing. (*Rivas-Colon*, *supra*, 241 Cal.App.4th pp. 451-452.)

A felony conviction of a conspiracy to commit a Proposition 47-eligible offense may not be reduced to a misdemeanor. (*People v. Segura* (2015) 239 Cal.App.4th 1282.)

If the crime involves the simple theft of merchandise displayed for sale, there is no question the crime fits within section 459.5 if the value does not exceed $950. Appellate courts have been divided on whether the crime applies to less obvious forms of theft such as attempting to cash a forged or stolen check. The issue usually arises in the context of a request for relief under section 1170.18 where the defendant has been convicted of the crime of second degree burglary. Since burglary is committed with the entry into a building "with the intent to commit grand or petit larceny or any other felony," the courts have struggled with whether the tendering of a fraudulent check is actually "larceny." The issue has been resolved by the Supreme Court in *People v. Gonzales* (2017) 2 Cal.5th 858. In *Gonzales* the defendant entered a bank to cash a stolen check of less than $950. The court found the conduct to be shoplifting as defined by section 459.5. The court observed that section 490a provides that whenever a statute references "larceny, embezzlement or stealing," it must be interpreted as "theft." The court applied section 490a to crimes committed under section 459.5. (*Id*., at pp. 868-875.) The court specifically held that "shoplifting" is not limited to situations where the defendant steals merchandise on display. (*Id*., at pp. 873-874.) If section 459.5 applies, the defendant may not be alternatively charged with burglar or identity theft. (*Id*., at pp. 876-877.)

Assuming the petitioner has been convicted of a qualified crime, the burden will be on the prosecution to establish that the petitioner has a prior conviction of a disqualifying "super strike," or is required to register as a sex offender under section 290(c). Although there is no express pleading and proof requirement regarding the disqualifying factors, as a practical matter the prosecution will have access to the necessary court records to establish the exclusion. Additionally, there is a general principle that if a party seeks the benefit of an exclusion, the burden of proving the exclusion is on the party seeking it. (See, e.g., *People v. Feno* (1984) 154 Cal.App.3d 719, 727-728.) It is unlikely that the language in section 1170.18(b), that the "court shall determine whether the petitioner satisfies the criteria in subdivision (a)," is meant to place the burden

on the petitioner to show that he is *not* excluded because of a prior conviction or sex registration.

"Prior conviction" means the disqualifier was acquired at *any time* prior to the filing of the petition or application for relief, not just prior to the crime at issue. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179; *People v. Montgomery* (2016) 247 Cal.App.4th 1385; *People v. Walker* (2016) 5 Cal.App.5th 872 [defendant disqualified if conviction obtained prior to sentencing]; *People v. Casillas* (2017) 13 Cal.App.5th 745, 750 [conviction occurs prior to ruling on motion to reduce offense].)

In *People v. Hatt* (2018) 20 Cal.App.5th 321, the court held that a disqualifying offense where the conviction occurs prior to the ruling on the request for resentencing, will disqualify the defendant. In *Hatt*, the trial court continued the hearing on resentencing until after the completion of defendant's trial for murder, reasoning that if the defendant was convicted of the murder, he would be disqualified from any relief under Proposition 47. After the defendant was convicted of the murder, the court denied the motion for resentencing. The appellate court affirmed.

The parties may present additional documentation or evidence relevant to the determination of whether the petitioner meets the minimum statutory requirements of eligibility for resentencing. If the petitioner fails to show that he meets the minimum statutory requirements, the court may deny the petition and need not determine whether resentencing would pose an unreasonable risk of danger to public safety.

The statute does not define the scope of evidence admissible to prove or disprove the petitioner's eligibility for resentencing. *People v. Bradford* (2014) 227 Cal.App.4th 1332, 1337, a Proposition 36 case, concludes that the determination of eligibility is limited to the "record of conviction." The "record of conviction" constitutes "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens and Bigelow, "California Three Strikes Sentencing," The Rutter Group, § 4:5, pp. 4-14 - 4-35 (2014).) It is unlikely that the court may consider live testimony or other documentation offered by either party if it is outside the "record of conviction." Such evidence is prohibited in the context of proving a strike. (*Reed*, *supra*, and *People v. Guerrero* (1988) 44 Cal.3d 343.)

*People v. Sherow* (2015) 239 Cal.App.4th 875, seems to suggest the court may consider petitioner's declaration: "A proper petition could certainly contain at least Sherow's testimony about the nature of the items taken. If he made the initial showing *the court can take such action as appropriate to grant the petition* or permit further factual determination. (*People v. Bradford* (2014) 227 Cal.App.4th 1332, 1341.)" (*Sherow*, at p.880; italics added.)

The probation report is not a part of the record of conviction. It was error by the trial court to use the probation report in establishing the defendant was armed at the time of the crime. (*People v. Burns* (2015) 242 Cal.App.4th 1452 [a Proposition 36 case].)

**b. Determination of dangerousness**

The second phase of the hearing, assuming the petitioner is statutorily qualified to petition for relief, is to determine whether he presents an unreasonable risk of danger to public safety if resentenced. "If the petitioner satisfies the criteria [for resentencing] . . . , the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . , unless the court, in its discretion, determines that resentencing petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18(b).) "'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(e)(2)(C)(iv). (§ 1170.18(c).) "The critical inquiry ... is not whether the risk is quantifiable, but rather, whether the risk would be 'unreasonable.' " (*People v. Garcia* (2014) 230 Cal.App.4th 763, 769, 178 Cal.Rptr.3d 883; also *People v. Hall* (2016) 247 Cal.App.4th 1255, 1262.)

**Danger of committing a specified violent felony**

The determination of dangerousness is predicated on the current risk that the petitioner "will commit a new *violent felony within the meaning of*" section 667(e)(2)C)(iv) – the "super strikes." (Italics added.) The court must determine whether there is an unreasonable risk that the petitioner will commit one of the "super strikes," not whether there is an unreasonable risk that the petitioner will commit other serious or violent felonies such as a robbery, kidnapping or arson. (For a complete table of the listed violent felonies, see Appendix V.) Specifically, the court must determine whether there is an unreasonable risk that the petitioner will commit any of the following offenses:

**(a) A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) [Sexually Violent Predator Law]**: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and

that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

**(b) Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.**

**(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.**

**(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive.** Potential conviction for voluntary manslaughter under section 192(a), involuntary manslaughter under section 192(b), and vehicular manslaughter under section 192(c) will not exclude the defendant from the benefits of the new law.

As noted, the determination of dangerousness includes the potential of committing gross vehicular manslaughter while intoxicated, in violation of section 191.5(a). In that regard, likely the court will be able to consider the person's history of substance abuse and driving as it relates to the person's potential of killing someone while operating a vehicle under the influence of alcohol or drugs.

**(e) Solicitation to commit murder as defined in section 653f.**

**(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).**

**(g) Possession of a weapon of mass destruction, as defined in section 11418(a)(1).**

**(h) Any serious or violent offense punishable in California by life imprisonment or death.**

The court clearly may deny the petition of an offender who presents an unreasonable risk of committing any crime that has a base term punishment of life in prison, such as first or second degree murder. There is an issue, however, whether a court may consider the likelihood of the petitioner committing a life-term crime because of the application of an alternative sentencing scheme such

as the Three Strikes law. The analysis must begin with a careful reading of the applicable statutes. Section 1170.18(d) defines an "unreasonable risk of danger to public safety" to mean that the petitioner will commit "a new *violent felony* within the meaning of" section 667(e)(2)(C)(iv). (Italics added.) Section 667(e)(2)((C)(iv)(VIII) includes "any *serious and/or violent felony* offense punishable in California by life imprisonment or death." (Italics added.) Section 667(e) defines "serious and or violent felony" by a cross-reference to section 667(d). Section 667(d)(1) defines a serious and/or violent felony for the purposes of the Three Strikes law as "[a]ny offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." The plain language of the statutes suggest that the court may consider whether there is an unreasonable risk that the petitioner will commit a violent felony listed in section 667.5(c), if the crime is punishable by life imprisonment or death. The list of potential offenses appears more than just the "super strikes" specified in section 667(e)(2)(C)(iv), but does not include all felonies that might receive a life sentence.

The question is whether the court may consider the likelihood of a petitioner committing a new violent felony listed in section 667.5(c), other than a "super strike," and because the petitioner has two or more strikes, will commit a "violent offense punishable in California by life imprisonment. . . ." The recent case of *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*), which sets forth a helpful analysis of three California Supreme Court cases, is instructive.

**The *Williams* case**

*Williams* concerned the application of the 10-year gang enhancement under section 186.22(b)(1)(C). That section requires the addition of 10 years to any term imposed for a violent felony committed for the benefit of a street gang under section 186.22(b)(1). Section 186.22(b)(1) "states that '[e]xcept as provided in paragraphs 4 and 5,' the trial court shall impose the gang enhancement. Subdivision (b)(5) provides, in relevant part: '[A]ny person who violates this subdivision in the commission of a felony *punishable by imprisonment in the state prison for life* shall not be paroled until a minimum of 15 calendar years have been served.' (Italics added.) 'This provision establishes a 15–year minimum parole eligibility period, rather than a sentence enhancement for a particular term of years.' [Citation omitted.]" (*Williams*, *supra*, 227 Cal.App.4th at p. 740; italics in original.)

*Williams* found three Supreme Court cases relevant to the issue. "The first is *People v. Montes* (2003) 31 Cal.4th 350, 352, 2 Cal.Rptr.3d 621, 73 P.3d 489 (*Montes*). In *Montes,* the defendant was convicted of attempted murder with findings that he committed the crime for the benefit of a street gang (§ 186.22,

subd. (b)(1)) and that he had personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced him to the 7–year midterm for the attempted murder conviction plus a consecutive 10–year term for the gang enhancement, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.) [¶] The issue was whether 186.22, subdivision (b)(5)'s use of the phrase 'a felony punishable by imprisonment ... for life' applied to the defendant because his felony conviction *coupled with his firearm enhancement* resulted in a life sentence. (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) Based upon its analysis of legislative and voter intent, *Montes* concluded: '[S]ection 186.22(b)(5) applies only where the felony *by its own terms provides for a life sentence.*' (*Ibid.*; italics added.) *Montes* therefore found that the consecutive 10–year term for the gang enhancement had been correctly imposed because the defendant had not been convicted of 'a felony punishable by imprisonment ... for life.' (§ 186.22, subd. (b)(5).) (*Id*. at p. 353, 2 Cal.Rptr.3d 621, 73 P.3d 489.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 740-741; italics in original; footnote omitted.)

The second case "is *People v. Lopez* (2005) 34 Cal.4th 1002, 22 Cal.Rptr.3d 869, 103 P.3d 270 (*Lopez*). In *Lopez,* the defendant was convicted of first degree murder (§ 187). The punishment for that crime is a term of 25 years to life. (§ 190, subd. (a).) The jury also found that the defendant had committed the murder for the benefit of a street gang (§ 186.22, subd. (b)). The trial court sentenced the defendant, among other things, to 25 years to life in state prison for murder with a consecutive 10–year term for the gang enhancement. (*Id*. at p. 1005, 22 Cal.Rptr.3d 869, 103 P.3d 270.) [¶] The Supreme Court granted review in *Lopez* to decide whether a defendant convicted of first degree murder with a gang enhancement finding should be subject to a consecutive term of 10 years under section 186.22, subdivision (b)(1)(C) or, instead, the minimum parole eligibility term of 15 years set forth in section 186.22, subdivision (b)(5). [¶] The heart of the dispute was whether the phrase 'punishable by imprisonment ... for life' in section 186.22, subdivision (b)(5) meant 'all life terms (including terms of years to life)' as contended by defendant or, as urged by the Attorney General, meant "merely 'straight' life terms" so that the phrase did not include a sentence for first or second degree murder. (*Lopez, supra,* 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) *Lopez* concluded that the statutory language 'is plain and its meaning unmistakable': 'the Legislature intended section 186.22(b)(5) to encompass both a straight life term as well as a term expressed as years to life ... and therefore intended to exempt those crimes from the 10–year enhancement in subdivision (b)(1)(C). [Citation.]' (*Id*. at pp. 1006–1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) Consequently, *Lopez* directed deletion of the 10–year sentence for the gang enhancement. (*Id*. at p. 1011, 22 Cal.Rptr.3d 869, 103 P.3d 270.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 741-742; footnote omitted.)

The third case is "[*People v. Jones* (2009)] 47 Cal.4th 566, 98 Cal.Rptr.3d 546, 213 P.3d 997. In *Jones,* the defendant was convicted of shooting at an inhabited dwelling, a crime punishable by a sentence of three, five or seven years. (§ 246.) The trial court selected the seven-year term but then imposed a life sentence pursuant to section 186.22, subdivision (b)(4) because the jury had found the defendant committed the crime to benefit a street gang. (*Id*. at p. 571, 98 Cal.Rptr.3d 546, 213 P.3d 997.) In addition, the trial court imposed a consecutive 20–year sentence because the defendant had personally and intentionally discharged a firearm in committing the offense. (§ 12022.53, subd. (c).) (*Id*. at p. 569, 98 Cal.Rptr.3d 546, 213 P.3d 997.) The sentence for that latter enhancement applies to the felonies listed in section 12022.53, subd. (a)(1–16) as well as to '[a]ny felony punishable by ... imprisonment ... for life.' (§ 12022.53, subd. (a)(17).) Shooting at an inhabited dwelling is not one of the listed felonies but the trial court determined that defendant had been convicted of a felony punishable by life imprisonment because of the application of section 186.22, subdivision (b)(4).

"Section 186.22, subdivision (b)(4) provides: 'Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment ... [¶] (B) ... a felony violation of Section 246.' [¶] On appeal, the issue was whether the trial court properly imposed the 20–year sentence enhancement (§ 12022.53) based upon its finding that the defendant had suffered a felony punishable by life. The defense contended that the phrase '[a]ny felony punishable by ... imprisonment ... for life' (§ 12022.53, subd. (a)(17)) should be *narrowly construed* as it was in *Montes* to be limited to a felony which 'by its own terms provides for a life sentence.' (*Montes, supra,* 31 Cal.4th at p. 352, 2 Cal.Rptr.3d 621, 73 P.3d 489.) In particular, the defendant urged that his life term could not trigger application of section 12022.53, subdivision (c)'s additional 20–year prison term 'because his sentence of life imprisonment did not result from his conviction of a *felony* (shooting at an inhabited dwelling) but from the application of section 186.22(b)(4), which sets forth not a felony but a penalty.' (*Jones, supra,* 47 Cal.4th at p. 575, 98 Cal.Rptr.3d 546, 213 P.3d 997.)" (*Williams*, *supra*, 227 Cal.App.4th at pp. 742-743; footnotes omitted; italics in original.)

*Williams* observed that *Jones* distinguished *Montes,* quoting *Jones*: "'Thus, this court in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], narrowly construed the statutory phrase "a felony punishable by imprisonment ... for life," which appears in subdivision (b)(5) of section 186.22, as applying only to crimes where the underlying felony provides for a term of life imprisonment. (*Id.* at p. 352 [2 Cal.Rptr.3d 621, 73 P.3d 489].) Defendant here argues that to be

consistent with *Montes,* we should give the statutory phrase "felony punishable by ... imprisonment in the state prison for life," which appears in subdivision (a)(17) of section 12022.53, the same narrow construction, and that, so construed, it does not include a life sentence imposed under an alternate penalty provision. *We agree with defendant that these statutory phrases should be construed similarly*. But we disagree that, construed narrowly, a felony that under section 186.22(b)(4) is punishable by life imprisonment is not a "felony punishable by ... imprisonment in the state prison for life" within the meaning of subdivision (a)(17) of section 12022.53. [¶] 'Unlike the life sentence of the defendant in *Montes, supra,* 31 Cal.4th 350 [2 Cal.Rptr.3d 621, 73 P.3d 489], which was imposed as a *sentence enhancement* (a punishment added to the base term), here defendant's life sentence was imposed under section 186.22(b)(4), which sets forth the *penalty for the underlying felony* under specified conditions. The difference between the two is subtle but significant. "Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself,* when the jury has determined that the defendant has satisfied the conditions specified in the statute." [Citation.] Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§ 12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of section 12022.53(c) was proper.' (*Jones, supra,* 47 Cal.4th at pp. 577–578, 98 Cal.Rptr.3d 546, 213 P.3d 997, some italics added.)" (*Williams*, *supra*, 227 Cal.App.4th at p. 743; italics in original; footnote omitted.)

In concluding the trial court erred in imposing the 10-year gang enhancement, *Williams* observed: "In this case, defendant received sentences of 25 years to life. These sentences of 25 years to life constitute life sentences within the meaning of section 186.22, subdivision (b)(5). (*Lopez*, *supra*, 34 Cal.4th at p. 1007, 22 Cal.Rptr.3d 869, 103 P.3d 270.) These life sentences resulted from the application of the Three Strikes law. The Three Strikes law is a penalty provision, not an enhancement. It is not an enhancement because it does not add an additional term of imprisonment to the base term. Instead, it provides for an alternate sentence (25 years to life) when it is proven that the defendant has suffered at least two prior serious felony convictions. (See, *e.g.*, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527, 53 Cal.Rptr.2d 789, 917 P.2d 628 ['The Three Strikes law ... articulates an alternative sentencing scheme for the current offense rather than an enhancement.'].)" (*Williams*, *supra*, 227 Cal.App.4th at p. 744.)

**Application of *Montes, Lopez, Jones* and *Williams* to Proposition 47**

Application of *Montes*, *Lopez*, *Jones*, and *Williams* to the Proposition 47 exclusion under section 667(e)(2)(C)(iv)(h) must be guided by the intent of the enactors in creating the restriction. It is clear the enactors specifically intended to exclude dangerous and violent offenders from any of the benefits of the initiative. "This Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." (Proposition 47, Section Two.) "Here's how Proposition 47 works: . . . *[It] Keeps Dangerous Criminal Locked Up*: [It] [a]uthorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation." (Argument in Favor of Proposition 47, Voter Information Guide, p. 38; italics in original.) "[Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (Rebuttal to Argument Against Proposition 47, Voter Information Guide, p. 39.) The initiative directs that it "shall be broadly construed to accomplish its purposes," and "shall be liberally construed to effectuate its purposes." (§§ 15 and 18, Proposition 47.)

Taking into consideration the intent of the enactors that the provisions of Proposition 47 be liberally and broadly construed to exclude dangerous and violent offenders from any of its benefits, it seems consistent that courts should consider the effect of alternative sentencing schemes such as the Three Strikes law in determining whether a particular person presents an unreasonable risk to public safety. Nothing in the initiative or in logic indicates that the enactors would want courts to only consider the risk that a petitioner would commit crimes with stand-alone life terms as potentially too dangerous to resentence, but not consider as too dangerous the risk of a petitioner committing a crime that would result in a life term due to an alternative sentencing scheme such as the Three Strikes law or an enhancement. A potential Three Strikes Law life term means the petitioner has at least two serious or violent felony prior convictions, and a potential life term due to an enhancement means the petitioner would have had to engage in serious gang or weapon activity. If there is evidence adduced that such activity may reoccur, those persons may be potentially dangerous and violent and unsuitable for resentencing.

**Burden of proof**

There was some uncertainty as to the burden of proof of dangerousness, which has been resolved by the Supreme Court in *People v. Frierson* (2017) 4 Cal.5th 225, a decision under Proposition 36: "The determination whether a defendant poses an unreasonable risk of danger to public safety is discretionary (§ 1170.126, subd. (f)), and several Courts of Appeal have properly concluded that '[t]he facts upon which the court's finding of unreasonable risk is based must be

proven by the People by a preponderance of the evidence ... and are themselves subject to [appellate] review for substantial evidence.' (*People v. Buford* (2016) 4 Cal.App.5th 886, 901, 209 Cal.Rptr.3d 593; see also *People v. Flores* (2014) 227 Cal.App.4th 1070, 1075-1076, 174 Cal.Rptr.3d 390; *Kaulick, supra,* 215 Cal.App.4th at pp. 1301-1305, 155 Cal.Rptr.3d 856.) As *Kaulick* reasoned, 'it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard.' (*Id*. at p. 1305, 155 Cal.Rptr.3d 856.) Defendant does not argue otherwise, and recognizes that 'to adjust for situations in which a dangerous defendant is deemed *eligible* for a sentence recall, for whatever reasons including shortcomings in the record of the prior, the recall court has discretion to decline resentencing to safeguard the public.' " (*Frierson*, at p. 239; italics in original.) Nothing in Frierson suggests that the rule would be any different for cases under Proposition 47.

**Current dangerousness**

Although nothing in Proposition 47 expressly addresses the issue, likely the court must determine whether the petitioner "currently" presents an unreasonable risk of danger to public safety. The requirement that the court consider only current dangerousness is not applicable when the defendant will remain in custody if the petition is granted. In that circumstance, the court must look to potential dangerousness when the defendant actually will be eligible for release. The court must also consider whether that release will be subject to a further review of dangerousness. *People v. Williams* (2018) 19 Cal.App.5th 1057, a Proposition 36 case, discusses the issue. "In *People v. Johnson* (2015) 61 Cal.4th 674, 189 Cal.Rptr.3d 794, 352 P.3d 366, our Supreme Court held that a defendant who is convicted of both a serious or violent felony and a felony that is not serious or violent is eligible for section 1170.126 resentencing on the felony that is not serious or violent. (*Johnson*, at p. 679, 189 Cal.Rptr.3d 794, 352 P.3d 366.) In coming to this conclusion, the Supreme Court was mindful of the fact that petitioner would still be serving a life term even after resentencing. 'Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an

inmate who has served a sentence that fits the crime and who is no longer dangerous.' (*Id*. at p. 695, 189 Cal.Rptr.3d 794, 352 P.3d 366.) [¶] This reasoning drives the analysis in this case as well. Determining whether resentencing a defendant poses an unreasonable risk of danger to society is necessarily a forward-looking inquiry. When determining whether resentencing poses an unreasonable risk of danger, the trial court must look to when a defendant would be released if the petition is granted and the defendant is resentenced. A defendant who would obtain immediate release if the petition is granted poses a different potential danger to society than a defendant who could be released only in his or her 70's. This applies with even greater force to a defendant who would still be serving a sentence greater than a human lifespan even if the petition was granted. For example, defendant's current term of 193 years to life is the equivalent of life without parole since he cannot obtain parole until far beyond a human lifespan. Taking 25 years off this term would still leave a parole date beyond any possible life expectancy. If a defendant's term is still effectively life without parole after resentencing, then resentencing cannot pose an unreasonable risk to public safety."

**"Unreasonable" is not subject to a vagueness challenge**

In a Proposition 36 case, *People v. Flores* (2014) 227 Cal.App.4th 1070 (*Flores*), the court rejected a petitioner's challenge that the phrase "unreasonable risk of danger to public safety," was vague. The court stated: "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. (See e.g. *People v. Espinoza* (2014) 226 Cal.App.4th 635 [grant of relief where a lesser sentence would not impose an unreasonable risk of harm to the public safety].) [Footnote omitted.] This is one of those instances where the law is supposed to have what is referred to by Chief Justice Rehnquist as 'play in the joints.' (*Locke v. Davey* (2004) 540 U.S. 712, 718 [158 L.Ed.2d 1].) 'This is a descriptive way of saying that the law is flexible enough for the . . . trial court to achieve a just result depending upon the facts, law, and equities of the situation.' (*Advanced Mod. Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835.)" (*Flores*, at p. 1075.)

**Other analogous contexts**

The phrase "unreasonable risk of danger to public safety" does not exist in any other California statutes. The requirement of a court to consider the potential risk of future criminal behavior, however, does arise in various circumstances. Under the Sexually Violent Predator Law (Welf. & Inst. Code, §§ 6600, *et seq*.), for example, to prove that a person is an SVP it must be shown that because of a defendant's mental disorder, it is "likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst., §§ 6600(a), 6601(d).) The Supreme

Court has concluded that "the phrase '*likely* to engage in acts of sexual violence' (italics added), as used in section 6601, subdivision (d), connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court (Ghilotti)*(2002) 27 Cal.4th 888, 922; italics in original.) The court expressly rejected a requirement that the potential of committing a future sexually violent offense was "more likely than not." (*Id*. at pp. 923-924.)

**Nature of the hearing**

The initiative defines an "unreasonable risk of danger to public safety" as "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." (§ 1170.18(c).) In determining dangerousness, the court may consider three sources of information: (1) the petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) the petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.18(b).)

It is clear that since the court has the authority to consider any relevant evidence, the inquiry is not limited to the record of conviction. It will be necessary for the court to make its determination without the petitioner ever having been convicted of a "super strike" – because such a prior conviction would disqualify the petitioner as a matter of law without the need for any consideration of dangerousness. (§ 1170.18(i).) It is likely the hearing will focus on whether the petitioner has engaged in sufficient violent conduct to allow a court to find that the pattern of conduct creates an unreasonable risk that a super strike will be committed.

The hearing itself likely will be conducted in the same manner as an original sentencing proceeding. There is nothing in Proposition 47 that suggests the rules of evidence and procedure would be any different than those employed in traditional sentencing proceedings. Accordingly, there likely may be a limited use of hearsay evidence, such as that found in probation reports. The California Supreme Court has directed that at sentencing, the court is permitted to

consider a broad range of information, including responsible unsworn and out-of-court statements concerning the defendant, provided there is a substantial basis for believing the information is reliable. (*People v. Arbuckle* (1978) 22 Cal. 3d 749, 754; *People v. Lamb* (1999) 76 Cal. App. 4th 664, 683.) By statute, when imposing sentence the court may consider the "record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing." (§ 1170(b).)

The scope of evidence that is admissible for the determination of dangerousness appears very broad, given the factors set forth in the statutory definition, listed above. Section 1170.18(b)(3) specifically authorizes consideration of any relevant evidence in the determination of dangerousness – likely including the use of live testimony.

Whether a petitioner is dangerous if resentenced will depend on a careful review of all of the petitioner's circumstances. Some of the factors the court may wish to consider under the "catch-all" phrase of (b)(3) are:

- The actuarial risk rating of the petitioner and classification score by CDCR.
- The extent to which the petitioner has a well-grounded re-entry plan and support services, including the extent of any support services that may be ordered by the court on resentencing.
- The extent of any significant mental health issues, particularly those that will require continuing intervention and medication. It may be useful for the court to appoint a qualified mental health professional under Evidence Code, section 730 to assist in this aspect of the review. While normally a petitioner would have a medical privilege not to have psychological records disclosed, likely the privilege will be deemed waived by the filing of a petition under section 1170.18. Certainly the psychological history of a petitioner can have a direct bearing on the issue of dangerousness.
- Information disclosed by a current review of the petitioner's record of convictions. In other words, whether the petitioner's pattern of criminal conduct is reflective of dangerousness.
- Whether any victims were particularly vulnerable.
- The extent to which there may be non-criminal evidence of the petitioner's character or violent tendencies.

**Finding of dangerousness upheld**

*People v. Hall* (2016) 247 Cal.App.4th 1255, 1265-1266, found no abuse of discretion in the trial court's finding that defendant posed an unreasonable risk of danger to public safety if resentenced: "The trial court did not abuse its discretion. In making its finding that resentencing Hall would result in an unreasonable risk to public safety, the court clearly stated an awareness of its discretion. It further explained: 'There's two things that really strike the Court. The first has to do with what would appear to be ... a continual and consistent escalation in the types of crimes that [Hall] has committed throughout his criminal history and the seriousness of those crimes. [¶] ... [¶] What's not lost on the Court ... is that in each of [Hall's most recent offenses he] indicates a willingness to not only use force but to use deadly force. In the 2012 case, [Hall] is alleged to have told the victim, quote, "Stop following me or I'm going to kill you." In the most recent case, [Hall] did use a knife and did indicate to [Sinclair] that ... if she didn't let go of the purse, he would stab her. So in two instances, I've got what I think can be fairly recognized as circumstantial evidence of an individual who has the present capacity to, and presumably the willingness to use deadly force. [¶] And if I look at those factors and if I look at how contemporaneous those incidents are in time to the request being made today, ... [¶] ... I think ... *a reasonable inference can be drawn that* [*Hall* ] *is in fact ready, willing, and able to commit one of those super strikes* if ... one of his victims doesn't comply with his unreasonable and unlawful demands.' (Italics added.) [¶] Hall insists that the trial court improperly 'substituted a finding that [he] had committed "generally dangerous" crimes for a finding that he was likely to commit a specified highly dangerous crime.' Contrary to Hall's assertion, the court did not indicate the unreasonable risk of danger to public safety exception applied merely because Hall was 'generally dangerous' or a violent felon with strike priors. Rather, the court clearly considered whether Hall presented an unreasonable risk of committing a 'super strike' if resentenced. Thus, the trial court applied the appropriate standard for determining whether Hall posed an unreasonable risk of danger to public safety. (§§ 1170.18, subds. (b)–(c), 667, subd. (e)(2)(C)(iv); *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1309, 194 Cal.Rptr.3d 658.) [¶] The trial court also expressly considered each enumerated factor in exercising its discretion. (§ 1170.18, subd. (b)(1)–(3).) The court's 'dangerousness' finding is supported by those same factors—Hall's criminal record and his record of rehabilitation. [Footnote omitted.] Hall apparently has no record of prison misconduct, but for nearly two decades he has regularly engaged in serious criminal behavior that has become increasingly violent. Hall's criminal history began in 1998 with misdemeanor receipt of stolen property, for which he was sentenced to three years on probation. Approximately two years later, in 2001, he drove recklessly while evading a peace officer and committed two counts of unlawful possession of a controlled substance. Hall was sentenced to prison for 16 months. Upon release in 2002, he committed a robbery (his first

strike), as well as two felony counts of grand theft from a person and was sentenced to six years in prison. In 2009, he was convicted of possession for sale and received three years on probation. While still on probation in 2010, he committed another felony count of reckless driving while evading a police officer and was sentenced to 16 months in prison. In 2012, he was convicted of misdemeanor illegal weapons possession (former § 12020) and second degree robbery (his second strike). He was sentenced to five years on probation, with one day in jail, on the latter conviction. Hall committed his current offense approximately six months later. [¶] Hall has been provided numerous opportunities to reform, but he has made no serious efforts. In fact, his most recent offenses are the most concerning, and the instant offense was committed while he was on probation. In the 2012 robbery conviction, Hall threatened to kill his victim. In his most recent offense, Hall pressed a knife against Sinclair's stomach and threatened to stab her if she did not give him her purse. When interviewed by the probation officer regarding his most recent offense, Hall denied responsibility. [¶] The trial court could reasonably infer from Hall's recent criminal behavior and repeated failure to rehabilitate that he presents an elevated—and escalating—risk of not only threatening violence, but also using deadly force. (See § 667, subd. (e)(2)(C)(iv)(IV).)" (Italics in original.)

Similarly, in *People v. Jefferson* (2016) 1 Cal.App.5th 235, 245, the court found no abuse of discretion in the finding of dangerousness: "In denying defendant's petition on dangerousness grounds, the court noted that defendant's 'most serious' crime was the 1997 robbery, and 'as robberies go' it was 'one of the worst ones.' The court reasoned that defendant's 1997 robbery and related convictions, in combination with his rule violations in prison, his 'string of parole violations,' and his current felony conviction, showed he was likely to commit a super strike. [Footnote omitted] (§§ 667, subd. (e)(2)(C)(iv), 1170.18, subd. (b)(1), (2).)"

**Relationship to relief under section 1385**

It is important to observe that while the review of a petition under section 1170.18 has some similarity to consideration of a motion to dismiss strikes under section 1385, petitions for resentencing are actually governed by a somewhat different standard. In ruling on a motion to dismiss a strike, the court must determine whether "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character and prospects, the defendant may be deemed to be outside the . . . spirit [of the Three Strikes law], in whole or in part." (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) The burden is on the petitioner to establish proper grounds for relief.

Under section 1170.18, however, the petition for resentencing must be granted unless the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Here, the prosecution must carry the burden of proving dangerousness. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301-1305.) While both sections 1385 and 1170.18 may involve a consideration of many of the same factors concerning the defendant (*e.g.*, family ties, employment history, age, remoteness of the crime and prior strikes), including the defendant's dangerousness, the court's discretion to refuse resentencing is more narrowly drawn than under section 1385. While a petitioner must prove he is "outside the spirit" of the Three Strikes law to obtain relief under section 1385, under section 1170.18 the petitioner is entitled to relief unless the court finds an unreasonable risk to public safety. Accordingly, merely because the court may have previously denied a request for dismissal of a strike at the original sentencing does not mean the court should deny a request for resentencing without independently determining whether the defendant "poses an unreasonable risk of danger to public safety."

**The hearing officer**

The petition should be heard by the judge who originally sentenced the petitioner, if available. (§ 1170.18(a).) If for some reason the original judge is unavailable, the presiding judge must designate another judge to rule on the petition. (§ 1170.18(l).) The petitioner may enter a waiver of the right to have the proceeding heard by the original sentencing judge, provided such a waiver is entered prior to any judicial decision on the petition. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279.) Although *Kaulick* does not mention the prosecution's right to have the matter heard by the original judge, presumably both parties must join in the waiver to be effective.

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5(p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge

unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial'].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion." (*Rodriguez*, at pp. 690-691.)

**The right of the victim to participate**

The resentencing hearing is considered a "post-conviction release proceeding" under Article 1, section 28(b)(7) of the California Constitution (Marsy's Law). (§ 1170.18(o).) If requested, the victim is entitled to notice of and to participate in the qualification and resentencing proceedings. Article 1, section 28(b)(7) entitles crime victims to "reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings." Section 28(b)(8) additionally entitles victims to "be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue." Even if the prosecution is stipulating to the resentencing, the court should ensure that proper notice has been given to the victim, if notice has been requested.

Section 28(e) of the California Constitution defines "victim" as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The

term ‘victim’ also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term ‘victim’ does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.”

**Right to counsel**

For a discussion of the right to counsel, see Section VIII, *infra*.

**Right of petitioner to be present**

Where the issue of eligibility for resentencing can be resolved as a matter of law without a resolution of disputed issues of fact, the petitioner has no constitutional right to be present for the proceedings. However, if the right to relief turns on factual questions, the petitioner has a right to be present at the hearing. “It is unquestionably true that in some cases the issue of eligibility for Proposition 47 relief can be and will be determined as a matter of law, without any factual contest. ([*People v. Hall* (2016) 247 Cal.App.4th 1255,] 1263, 203 Cal.Rptr.3d 83.) That point is firmly established in the case law expounding on section 1170.18, subdivision (a), procedure. (See [*People v. Page* (2017) 3 Cal.5th 1175,] 1189; [*People v. Romanowski* (2017) 2 Cal.5th 903,] 916.) Where the issue of eligibility is decided on an unopposed basis, we have no quarrel with the idea that ‘a represented defendant has no constitutional or statutory right to be present to address purely legal questions or where his or her “presence would not contribute to the fairness of the proceeding.” ’ ([*People v. Fedalizo* (2016) 246 Cal.App.4th 98,] 109, 200 Cal.Rptr.3d 653, citing *People v. Perry* (2006) 38 Cal.4th 302, 312, 42 Cal.Rptr.3d 30, 132 P.3d 235 [‘a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case’].) But where, as in this case, a factual contest bearing on eligibility for Proposition 47 relief requires that an evidentiary hearing be held, we conclude the petitioning defendant has a right to be present, absent a valid waiver.” (*People v. Simms* (2018) 23 Cal.App.5th 987, 998.)

**No right to jury**

The petitioner has no right to a jury determination of the issue of dangerousness for resentencing. (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 240-242.) Other courts have determined, in the Proposition 36 context, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application due to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v.*

*Guilford* (2014) 228 Cal.App.4th 651, 662-663; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.)

4. The resentencing as a misdemeanor

If the petition is granted, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to" the new penalties. (§ 1170.18(b); see Appendix VI for an optional order form developed by the Criminal Justice Services Office of the Judicial Council.) If resentencing occurs, the conviction is to be treated as a misdemeanor for all purposes, except for the right to own or possess firearms. (§ 1170.18(k).) Presumably because section 1170.18(b) specifies the "petitioner's felony sentence shall be *recalled* and the petitioner *resentenced* to a misdemeanor," the petitioner will automatically be restored of all civil rights which had been denied because of the felony conviction. (italics added.)

Petitioner has a constitutional right to be present at the resentencing hearing. (*In re Guiomar* (2016) 5 Cal.App.5th 265, 277-279, affd. sub nom. *People v. Buycks* (2018) 5 Cal.5th 857.)

**Sentencing options available to the court**

For the most part, the court has complete discretion in the manner of resentencing the petitioner as a misdemeanant. The initiative, however, imposes three specific limitations:

(a) In no case may "the term" on resentencing be longer than the term originally imposed. (§ 1170.18(e).) Proposition 47 does not define the meaning of the phrase "the term." While it certainly would include any period of custody ordered in the case, there is some question whether it applies also to periods of supervision, such as probation, mandatory supervision, PRCS and parole.

**The "full resentencing rule"**

In *People v. Buycks* (2018) 5 Cal.5th 857, 893 (*Buycks*), the Supreme Court reviewed the scope of the trial court's discretion on resentencing: "We have held that when part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' (People v. Navarro (2007) 40 Cal.4th 668, 681, 54 Cal.Rptr.3d 766, 151 P.3d 1177, citing People v. Burbine (2003) 106 Cal.App.4th 1250, 1259, 131 Cal.Rptr.2d 628 ['upon remand for resentencing after the reversal of one or more subordinate counts of a

felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term'].) [¶] Similarly, in considering not only Proposition 47, but also analogous statutes addressing recalled sentences, the Courts of Appeal have concluded that, under the recall provisions of section 1170, subdivision (d), the resentencing court has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall. (*People v. Burbine, supra*, 106 Cal.App.4th 1250, 1258, 131 Cal.Rptr.2d 628; *People v. Sanchez* (1991) 230 Cal.App.3d 768, 772, 281 Cal.Rptr. 459; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457-1458, 253 Cal.Rptr. 173; *People v. Hill* (1986) 185 Cal.App.3d 831, 834, 230 Cal.Rptr. 109.) In this situation, we have recognized that the resentencing court may consider 'any pertinent circumstances which have arisen since the prior sentence was imposed.' (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 460, 279 Cal.Rptr. 834, 807 P.2d 1063.) This principle, which we shall call the 'full resentencing rule,' has also been applied to recall and resentencing provisions enacted by Proposition 36, the Three Strikes Reform Act of 2012. (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118, 198 Cal.Rptr.3d 784.) Finally, several Courts of Appeal have upheld the modification of every aspect of a defendant's sentence by a resentencing court following a successful petition to recall only part of that sentence under Proposition 47. (*In re Guiomar, supra*, 5 Cal.App.5th 265, 272-275, 209 Cal.Rptr.3d 797; *People v. Cortez* (2016) 3 Cal.App.5th 308, 317, 207 Cal.Rptr.3d 510; *People v. McDowell* (2016) 2 Cal.App.5th 978, 982, 206 Cal.Rptr.3d 765; *People v. Roach* (2016) 247 Cal.App.4th 178, 183, 202 Cal.Rptr.3d 1; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300, 199 Cal.Rptr.3d 360; *People v. Sellner* (2015) 240 Cal.App.4th 699, 701-702, 192 Cal.Rptr.3d 836.)" "Therefore, at the time of resentencing of a Proposition 47 eligible felony conviction, the trial court must reevaluate the applicability of any enhancement within the same judgment *at that time*, so long as that enhancement was predicated on a felony conviction now reduced to a misdemeanor. Such an enhancement cannot be imposed because at that point the reduced conviction 'shall be considered as a misdemeanor for all purposes.' (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may also challenge any prison prior enhancement in that judgment if the underlying felony has been reduced to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, at pp. 894-895, italics in original.)

If the Proposition 47 offense is the principal term in a consecutive sentence, it will be necessary for the court to resentence the case with the offense now being a misdemeanor and determine a new principal term. The misdemeanor sentence will be either fully concurrent with or

fully consecutive to the other counts. It may be necessary to "elevate" a subordinate term to be the new principal term. In selecting the new principal term, the court must select the sentence with the longest term actually imposed including count-specific conduct enhancements. The court would be free to select any term from the triad for a former subordinate count. The only restriction is that the aggregate sentence must not exceed the original aggregate sentence imposed by the court. Because the Proposition 47 count is part of a multiple-count sentencing scheme, changing the sentence of one count fairly puts into play the sentence imposed on non-Proposition 47 counts, at least to the extent necessary to preserve the original concurrent/consecutive sentencing structure. The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor.

The resentencing of a subordinate count was discussed in *People v. Sellner* (2015) 240 Cal.App.4th 699). There, defendant was originally sentenced on a Proposition 47-eligible offense to three years in prison. In a non-Proposition 47-eligibible offense she was sentenced to a consecutive eight months. Following the successful application for resentencing of the Proposition 47-eligible crime as a misdemeanor, the trial court resentenced the non-Proposition 47-eligibile offense to two years. The sentence was affirmed. "When the principal term is no longer in existence, the subordinate term must be recomputed. That is the case here. As long as the recomputed term is less than the prior aggregate term, the defendant has not been punished more severely for the successful filing of a Proposition 47 petition. [¶] Section 1170.18, subdivision (e) provides: "Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence." It does not trump section 1170.1, subdivision (a) or govern aggregate consecutive sentences which are treated as interlocking pieces. (*People v. Begnaud* [(1991) 235 Cal.App.3d 1548,] 1552.)" (*Sellner*, at p. 701.)

Upon resentencing of the defendant, the court may impose the same term as originally imposed, so long as the sentence is authorized. (*People v. Roach* (2016) 247 Cal.App.4th 178 (*Roach*). "A successful petition under section 1170.18 vests the trial court with jurisdiction to resentence the applicant, and in doing so the court is required to follow the generally-applicable sentencing procedures in section 1170, et seq. (See *People v. Sellner* (2015) 240 Cal.App.4th 699, 701 (*Sellner*).) In particular, section 1170.1, subdivision (a) directs a trial court how to determine an aggregate sentence, such as that at issue in the present case." (*Roach*, at p. 184.)

*Roach* analogized the resentencing process under section 1170.18 with the resentencing following an appeal. "We find some guidance from cases where a conviction underlying a principal term has been reversed on appeal and the matter remanded for resentencing. In that situation, the trial court on remand must 'select the next most serious conviction to compute a new principal term' and may also modify the sentences imposed on other counts as appropriate. (*People v. Bustamante* (1981) 30 Cal.3d 88, 104, fn. 12; see also *Sellner*, *supra*, 240 Cal.App.4th at pp. 701-702; *Begnaud*, *supra*, 235 Cal.App.3d at p. 1552.) In doing so, ' "the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." ' (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 (*Burbine*); accord *People v. Navarro* (2007) 40 Cal.4th 668, 681.) Similarly, where a petition under section 1170.18 results in reduction of the conviction underlying the principal term from a felony to a misdemeanor, the trial court must select a new principal term and calculate a new aggregate term of imprisonment, and in doing so it may reconsider its sentencing choices." (*Roach*, at p. 185.) Generally in accord with *Roach* are *People v. Garner* (2016) 244 Cal.App.4th 1113, 1117-1118, and *People v. McDowell* (2016) 2 Cal.App.5th 978, 981-982.

The ability of the court to resentence non-eligible counts also includes multiple misdemeanor counts in an aggregate sentence, provided the total term is equal to or less than the original sentence imposed by the court. "The reason courts are entitled to revisit sentencing decisions beyond merely selecting a new principal term in accordance with section 1170.1, subdivision (a), is that the aggregate length of a term matters. As the court stated in *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457, 253 Cal.Rptr. 173, 'A judge's subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge's experiences with prior cases and the record in the defendant's case, cannot be ignored. A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.' ¶ Aggregate misdemeanor sentencing, though not subject to the principal/subordinate scheme set forth in section 1170.1, subdivision (a), is nonetheless comprised of interdependent components designed to achieve the goals of sentencing based on the individual circumstances of the case. Allowing a court to revisit all of its misdemeanor sentencing decisions under section 1170.18, therefore, is not only consistent with

the statutory text, but sound public policy." (*People v. Cortez* (2016) 3 Cal.App.5th 308, 316-317.)

The ability to resentence non-eligible counts includes convictions in other cases if they are part of the defendant's aggregate sentence. "We do not agree that section 1170.18, subdivision (n) precludes a court from resentencing a defendant on convictions from separate cases when the terms for those convictions are part of the defendant's aggregate sentence. An aggregate sentence is comprised of the principal term and any subordinate terms, even if the convictions arose out of 'different proceedings or courts.' (§ 1170.1, subd. (a).) Thus, when a trial court is called upon to resentence the defendant, it retains jurisdiction over all component parts of the aggregate sentence. (See *Roach, supra,* 247 Cal.App.4th at p. 184, 202 Cal.Rptr.3d 1 [nothing in section 1170.18 'can reasonably be read to restrict the trial court's discretion to impose the same aggregate term upon resentencing'].) In other words, when an aggregate sentence includes convictions 'falling within the purview' of Proposition 47 (§ 1170.18, subd. (n)) as well as convictions not affected by Proposition 47, the trial court has jurisdiction to resentence on all of the convictions under section 1170.1, subdivision (a)." (*In re Guiomar* (2016) 5 Cal.App.5th 265, 273, affd. *sub nom. People v. Buycks* (2018) 5 Cal.5th 857.)

Generally in accord with *Sellner*, *Roach* and *Guiomar*, is *People v. Mendoza* (2016) 5 Cal.App.5th 535, 538: "When a trial court grants Proposition 47 relief on an eligible felony offense, it resentences the defendant to a misdemeanor. (§ 1170.18, subd. (b).) Proposition 47 does not limit the court to rigid sentencing options. (See *Sellner*, *supra*, 240 Cal.App.4th 699, 192 Cal.Rptr.3d 836; *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1076–1077, 202 Cal.Rptr.3d 614 (*Acosta*).) A trial court may reconsider any component underlying the sentence. (*Ibid*.; see also *People v. Roach* (2016) 247 Cal.App.4th 178, 186, 202 Cal.Rptr.3d 1; *People v. Rouse* (2016) 245 Cal.App.4th 292, 300, 199 Cal.Rptr.3d 360 [' "The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor." [Citation.]' (Italics omitted.) ].) For example, a trial court may impose six previously dismissed prior prison term enhancements when resentencing a defendant following Proposition 47 relief on another case. (*Acosta*, *supra*, at pp. 1076–1077, 202 Cal.Rptr.3d 614.) A trial court may also revisit and impose a harsher punishment on other non-Proposition 47 misdemeanor counts if a defendant is entitled to Proposition 47 resentencing on another count. (*People v. Cortez* (2016) 3 Cal.App.5th 308, 316–317, 207 Cal.Rptr.3d 510 (*Cortez*).)"

On the resentencing of the petitioner, the court may not consider a prior strike that was dismissed as part of the original plea in the case. (*Guiomar*, *supra*, at p. 279-280.)

(b) The petitioner must be given credit for any time served under the original sentence. (§ 1170.18(d).) Nothing in Proposition 47 suggests that it is the intent of the initiative to require immediate release of the petitioner irrespective of any further custody or supervision time that may be ordered; the resentence is not necessarily a release with "credit for time served" sentence. Were that the case, there would be no need for the limitation in section 1170.18(e) which prohibits a sentence longer than the one originally imposed. The intent of the statute is to give the resentenced petitioner full credit for any time that has been served, whether that time is in custody or on supervision. Accordingly, the petitioner is entitled to the following credits:

- For time served on a traditional commitment to county jail, custody credits will be awarded under section 4019: for every two days of actual time served, the petitioner is entitled to two days of actual time credit and two days of conduct credit.
- For time served on a sentence imposed under section 1170(h), custody credits will be calculated under section 4019 to the extent of any actual custody time served as part of the sentence. For time served on mandatory supervision, the petitioner will be entitled only to actual time served. (§ 1170(h)(5)(B).)
- For time served in state prison, credits will be calculated under section 2933: for every six months of actual time, the defendant is entitled to six months of conduct credits, or a similar ratio for time served of less than six months.
- If the petitioner had been sentenced as a strike offender under the Three Strikes law, but is resentenced as a misdemeanant, custody credits should be calculated using the traditional formula under section 2933 (50% credit), not the more restrictive formula specified by section 1170.12(a)(5) (20% credit), because the matter no longer falls under the Three Strikes law.

CDCR cannot calculate the credits for inmates who receive a misdemeanor sentence and time served in county jail because the custody time is not limited to state prison. However, it can provide the court with all credits earned by the inmate while in prison to assist in the final calculation of custody credits. Guidance for the proper calculation of credits may be found in *People v. Buckhalter* (2001) 26 Cal.4th 20, which concerns resentencing following appeal. Under *Buckhalter*, the trial court is charged with the responsibility to calculate all actual time

and conduct credits earned in the county jail. The trial court also is to calculate the actual time earned in state prison; conduct credits in prison, however, are calculated by CDCR. The CDCR calculations will be provided the court or the county jail upon request.

(c) The court must place the petitioner on parole for one year under section 3000.08, unless the court, in its discretion, releases the person from the requirement. (§ 1170.18(d).) Jurisdiction over the adjudication of parole violations will be in the county where the petitioner is released or resides, or in the county where the violation occurs. (§ 1170.18(d).) (See discussion of the parole requirement, *infra*.)

Subject to the foregoing limitations, the court is free to impose any form of misdemeanor sentence considered appropriate for the petitioner's circumstances. Assuming the petitioner has been convicted *only* of a crime changed by the initiative, the court would have the following sentencing options:

(a) The court may impose a straight term of custody in jail without ordering any form of supervision, less any credit for time served.

(b) The court may place the petitioner on formal or informal probation, with standard terms and conditions, including custody time in jail. The length of the probationary period generally is limited to three years, less any credit because of the service of prior incarceration or supervision periods. (§ 1203a.)

(c) The court must place the petitioner on parole for one year under the provisions of section 3000.08, "unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (§ 1170.18(d).) If placed on parole, the petitioner will be subject to all of the procedures and consequences available for persons on parole, including the use of intermediate sanctions such as flash incarceration under section 3000.08(e), and court sanctions imposed under section 3000.08(f). It is likely the provision for a period of parole was included in Proposition 47 as a response to some of the criticisms of Proposition 36 that no transition period was required for persons suddenly released from a 25-years-to-life sentence after many years in custody.

It is the intent of the initiative to authorize the one-year period of parole supervision *in addition to* any resentence imposed by the court, and without consideration of any credit that the petitioner may have earned. (*People v. Morales* (2016) 63 Cal.4th 399.) "A person who is resentenced pursuant to subdivision (b) shall be given credit for time served *and shall be subject to parole for one year following completion of his or her*

*sentence*. . . . Such person is subject to Section 3000.08 parole supervision . . . and the jurisdiction of the court . . . for the purpose of hearing petitions to revoke parole *and impose a term of custody*." (§ 1170.18(d); italics added.) Because the parole term is in addition to the basic misdemeanor sentence, the petitioner will not be allowed to apply excess custody credits to satisfy the supervision period. If there are excess custody credits, the court may apply them to reduce any unpaid fines at the rate of $125 per day. (§§ 1205(a) and 2900.5(a); *People v. Pinon* (2016) 6 Cal.App.5th 956, 966.)

If the defendant was on PRCS at the time of resentencing, the period of parole imposed under section 1170.18(d) may not extend beyond the original PRCS termination date. (*Pinon*, *supra*, at p. 966.) When a defendant is on PRCS for a crime subsequently specified as a misdemeanor, PRCS terminates upon the granting of the motion and the defendant may not be punished for a violation of PRCS. (*People v. Elizalde* (2016) 6 Cal.App.5th 1062].)

It is unlikely the sponsors of Proposition 47 ever contemplated persons resentenced for a crime punished under section 1170(h) or granted probation would be sent to state parole, unless the offender is incarcerated for other crimes in addition to the resentenced misdemeanor. For persons resentenced only on a misdemeanor, the court may conclude that some form of structured misdemeanor probation would be appropriate, either formal or informal, assuming there is jurisdictional time remaining after giving the defendant all of his custody and supervision credits. Since the defendant is before the court for resentencing, the court will likely have discretion to order some form of probation supervision if considered necessary in the particular case.

(d) If the petitioner is resentenced as a misdemeanor on an eligible count, but will remain sentenced as a felon on one or more other counts, the court should resentence on all counts. Time imposed for the misdemeanor may be fully concurrent with or fully consecutive to the remaining felonies. The "one-third the midterm" limitation applies only to crimes sentenced under the Determinate Sentencing Law, not to indeterminate terms or misdemeanors which are in different sentencing systems. (See § 1170.1(a).)

**Information needed by CDCR**

If a court grants a petition for resentencing for a prison inmate, CDCR will need a certified copy of the minute order from the resentencing proceeding. The order

should include all relevant information about the specific court findings and orders related to the new sentence. The order should be sent to the case records manager at the California institution where the individual is housed. If the inmate is housed in an out-of-state facility (COCF) or in a Community Correctional Facility (CCF), the documentation should be sent to the CDCR Contract Bed Unit (CBU). Faxed copies can be used by CDCR until the mailed copy is received.

The order of resentencing should clearly state whether the inmate is to be placed on PRCS or parole upon his release. If the petitioner remains subject to a prison commitment based on non-Proposition 47-eligibile offenses, the court should do a full resentencing of the petitioner with the eligible crime designated as a misdemeanor.

For additional issues related to orders sent to CDCR, see Section XI(M), *infra*.

**Supervision status of persons released from prison**

It is not entirely clear whether persons released from prison as a result of resentencing will be required to serve a three-year period of Postrelease Community Supervision (PRCS). Section 3451(a) provides: "*Notwithstanding any other law* and except for persons [serving a prison term for specified crimes], *all persons released from prison on and after October 1, 2011*, or, whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to [PRCS]. . . ." (Italics added.)

Proposition 47 does not directly address whether a petitioner released because of resentencing must be placed on PRCS. The issue is particularly perplexing because after resentencing the petitioner will only stand convicted of a misdemeanor. This issue has been addressed under Proposition 36 in the context of a person who has earned sufficient custody credits to discharge any new sentence and any period of post-release supervision. The issue was first discussed in *People v. Espinoza* (2014) 226 Cal.App.4th 635. *Espinoza* holds that section 3451(a) is unambiguous: "*Notwithstanding any other law* and except for [designated persons], all persons released from prison on and after October 1, 2011, or, whose sentence has been deemed served pursuant to Section 2900.5 after serving a prison term for a felony shall, upon release from prison and for a period not exceeding three years immediately following release, be subject to community supervision provided by a county agency designated by each county's board of supervisors which is consistent with evidence-based practices, including, but not limited to, supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under postrelease supervision." (Italics added.) The court expressly

rejected any application of *In re Sosa* (1980) 102 Cal.App.3d 1002, which holds that excess custody credits reduce any applicable *parole* period. *Espinoza* observed: "PRCS serves an important public interest to 'improve public safety outcomes' and facilitate 'successful reintegration back into society.' (§ 3450, subd. (a)(5); see *People v. Torres* (2013) 213 Cal.App.4th 1151, 1158.) Both the community and appellant will benefit from PRCS. The trial court said that the '[S]tate of California actually doesn't want Mr. Espinoza to return to custody. . . . To take so many years of incarceration and then fling the doors open and say, well, good luck, hope it all works out is likely to just result in a disaster.' We are hopeful that PRCS reduces the chance of disaster." (*Espinoza*, at pp. 641-642.)

The issue was next addressed in *People v. Tubbs* (2014) 230 Cal.App.4th 578, under substantially the same circumstances and with the same holding: section 3451 applies notwithstanding any other law and excess custody credits may not be used to reduce the supervision period. (*Id.* at pp. 584-585.)

Both *Espinoza* and *Tubbs* observed that with the application for resentencing under section 1170.126, the defendants placed themselves under a sentencing system, the realignment law, which requires PRCS. "[Defendant] was resentenced under a new sentencing scheme that requires PRCS '[n]otwithstanding any other law....'. (§ 3451.) The phrase '[n]otwithstanding any other law' is all encompassing and eliminates potential conflicts between alternative sentencing schemes. (*See e.g., People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 524, 53 Cal.Rptr.2d 789, 917 P.2d 628.) . . . [¶] In theory, the section 3453 terms and conditions of PRCS may be onerous and burdensome but they may also be viewed as providing incentive for the recidivist to mend his ways. In other words, we can reasonably say that the Legislature, like the trial court in the instant case, believed that such terms and conditions are not statutorily imposed as punishment. We need not go so far as to say that such terms were motivated from benevolence. It is sufficient to observe that the Legislative largess which resulted in appellant's release from prison came with a price, PRCS. This was the trade off. At oral argument, respondent characterized this as a 'package deal.' Appellant is not permitted to pick and choose which portion of realignment he agrees to and which portion he does not. 'He who takes the benefit must bear the burden.' (Civ. Code, § 3521.) (*Espinoza*, at pp. 639-640; see also *Tubbs*, at p. 585.)

*People v. Hickman* (2015) 237 Cal.App.4th 984, extends *Espinoza* and *Tubbs* to section 1170.18. In *Hickman* the defendant was on parole when Proposition 47 was enacted. The trial court granted defendant's request for resentencing, but ordered the defendant to serve a one-year period of parole under section 1170.18(d). The trial court refused to apply any excess custody credits to reduce the period of parole. The sentence was affirmed. *Hickman* held the parole period authorized by section 1170.12(d) is *in addition* to any term of

punishment. *In re Sosa* (1980) 102 Cal.App.3d 1002, which grants credits to reduce traditional parole periods, has no application to the parole period authorized by section 1170.12(d). (*Hickman*, at p. 988-989.) *Hickman* has been dismissed and transferred back to the court of appeal for reconsideration in light of *People v. Morales* (2016) 63 Cal.4th 399.

*People v. Steward* (2018) 20 Cal.App.5th 407, holds that excess credits should be applied to reduce a period of postrelease community supervision (PRCS). *Steward* distinguished *Morales* on the basis that in *Morales*, the Supreme Court denied the application of excess credits to the period of parole specified in Proposition 47. *Steward* observed that because PRCS is not mentioned in the statute, the normal rules for applying custody credits govern.

While not disagreeing with *Espinoza* and *Tubbs*, *People v. Superior Court (Rangel)*(2016) 243 Cal.App.4th 992, a Proposition 36 case, finds that refusal to apply excess credits to community supervision constitutes a denial of equal protection. "To summarize, the most recent conviction or convictions of all inmates subject to community supervision are relatively minor, and inmates resentenced under section 1170.126 have never been convicted of egregiously violent offenses; they have further been currently found not to present undue risk to the public. By contrast, inmates subject to parole all fall into one or more categories of serious and obvious risk. Yet the latter can use excess credits to reduce or wipe out parole supervision, while under the People's approach inmates subject to community supervision cannot so use their excess credits. Even under the 'rational basis' test, the distinction drawn by the People is simply unreasonable." (*Id.*, at p. 1001.) *Rangel* has been transferred back to the court of appeal for reconsideration in light of *People v. Morales* (2016) 63 Cal.4th 399.

If the petitioner qualifies for release on PRCS, the court should order the petitioner returned to the custody of CDCR for setting of conditions of PRCS and other processing, and immediate release. (§ 3451(c)(2).)

*Espinoza* and *Tubbs* did not directly address persons released on parole after resentencing. According to the law prior to realignment, if a defendant served his entire prison term, plus the parole term, he was entitled to be released unconditionally. This rule comes from section 2009.5. Section 2009.5(a) provides that custody credits apply against the term of imprisonment: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and days served in home detention pursuant to Section

1203.018, shall be credited upon his or her term of imprisonment, or credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. *If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served*." (italics added.) Section 2009.5(c) specifies the "term of imprisonment" includes any parole period. Once the entire term of imprisonment is satisfied, the defendant is entitled to be released from any custody or supervision. (*In re Sosa* (1980) 102 Cal.App.3d 1002.)

It is not clear how the parole requirement relates to persons resentenced under section 1170.18. Section 3000.08(a) provides that "[a] person released from state prison, after serving a prison term, or whose sentence has been deemed served pursuant to Section 2900.5, for any" designated crime, is subject to a period of parole. Most of the designated crimes will not be eligible for resentencing under Proposition 47, except for persons sentenced as a third strike offender for a qualified offense who have no prior "super strikes," and are not required to register as a sex offender. As to these offenders, the most appropriate action may be to order the one-year period of parole authorized by section 1170.18(d). Under such circumstances, the court should order the petitioner returned to CDCR for the setting of parole conditions and immediate release on parole.

**Correction of an unauthorized sentence**

*People v. Roth* (2017) 17 Cal.App.5th 694 (*Roth*), concerns the situation where a court grants relief under section 1170.18, only to subsequently discover that the subject offense did not qualify for resentencing under Proposition 47. The factual circumstances are succinctly stated by the appellate court: "Defendant James Roth pleaded no contest to, and was convicted of, second degree burglary (Pen. Code, § 459), a felony, based upon his entry into a storage locker with the intent to commit larceny. The trial court imposed sentence, but suspended execution and placed defendant on probation. His probation subsequently was revoked after the car he was driving was stopped by the police, who found methamphetamine in a bag that belonged to his passenger. Before the probation violation hearing was conducted, defendant filed a petition under section 1170.18 (part of the Safe Neighborhoods and Schools Act, which was passed by the voters as Proposition 47), asking the trial court to recall and resentence his conviction as a misdemeanor. The trial court granted the petition (without objection by the prosecutor), imposed a misdemeanor sentence, and placed defendant on summary probation. A month later, the court realized it had made a mistake in granting the petition because defendant's conviction did not qualify for recall under Proposition 47, and therefore the misdemeanor sentence

was unauthorized. After providing defendant an opportunity to be heard, the trial court vacated the misdemeanor sentence and reinstated defendant's felony conviction and sentence. The trial court subsequently conducted the probation violation hearing, found that defendant had violated probation, and revoked probation and executed the felony sentence." (*Roth*, at pp. 696-697.) The court of appeal affirmed. The court found that burglary of a storage unit was not a "commercial establishment" as contemplated by the crime of shoplifting defined in section 459.5. Accordingly, the burglary conviction did not qualify for relief under section 1170.18. The trial court's prior grant of relief constituted an unauthorized sentence which could be corrected at any time.

## VII. Application for reclassification of a crime (PC § 1170.18(f)-(n))

Section 1170.18 allows persons who have completed their sentence to apply to the court for reclassification of the offense as a misdemeanor. Section 1170.18(f) provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

For persons who have completed their sentence, relief is limited to the reclassification of the offense as a misdemeanor. There is no authority to "vacate" or otherwise alter the sentence previously imposed – such relief is only available to persons currently serving a sentence. (*People v. Vasquez* (2016) 247 Cal.App.4th 513, 518-519.)

### *A. Persons who may apply for relief*

The statute provides that any person who has completed a sentence imposed under any of the circumstances discussed in Section VI(A), *supra*, and who has no disqualifying prior convictions or requirement to register as a sex offender, may apply to the court for reclassification of a qualified crime as a misdemeanor. The application must be denied whether or not the disqualifying prior conviction was incurred before or after the crime which is the subject of the application; the disqualifying prior conviction only must occur prior to the filing of the application for relief. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179; *People v. Montgomery* (2016) 247 Cal.App.4th 1385.)

The fact that a qualified conviction has been dismissed under section 1203.4 does not preclude the granting of relief under Proposition 47. (*People v. Tidwell* (2016) 246 Cal.App.4th 212.)

The following persons will be eligible to apply for reclassification:

1. Persons who have completed a prison term

Persons who have completed a prison term, and any required period of parole or PRCS, will have the ability to apply for reclassification of any qualified offense as a misdemeanor. Persons who are still on parole or PRCS, however, have not completed their sentence, and must apply for resentencing under sections 1170.18(a)-(e). (*People v. Lewis* (2016) 4 Cal.App.5th 1085.)

2. Persons who have completed a term imposed under section 1170(h)(5)

Persons who have completed a county jail term imposed under the provisions of section 1170(h)(5), whether a straight or split sentence, will be eligible for relief.

3. Persons who have completed probation

Persons who have completed their terms of probation will be able to apply for relief. A person whose probation is terminated or has fulfilled a probationary sentence has "completed a sentence," in that there is no remaining sentence to serve. In addition, it would be anomalous for the enactors to intend to benefit persons who complete a prison term, but not a defendant who successfully completes the requirements of probation. (For a full discussion of whether a grant of probation qualifies as a "sentence," see Section VI(A)(4), *supra*.)

4. Juveniles

Nothing in Proposition 47 grants juveniles the right to apply for reclassification of offenses. Juveniles may be able to argue they should be allowed reclassification as a matter of equal protection of the law. (For a discussion of the rights of juveniles, see Section VI(A)(6), *supra*.) Because juveniles have the right to request resentencing, it is likely they also have the right to request reclassification. (See *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209.)

*B. Procedure for reclassification*

The procedure for obtaining a reclassification of a qualified crime is primarily specified by sections 1170.18(f) – (g). The procedure is designed to be simple and, wherever possible, avoid the need for formal court hearings.

1. <u>Filing of an application</u>

As with the procedure for resentencing, the process for obtaining a reclassification begins with the filing of an application with "the trial court that entered the judgment of conviction. . . ." (§ 1170.18(f).) The application must be filed by November 5, 2017, unless good cause is shown. (§ 1170.18(j).) No particular form of application is required. (For an optional application form, see

Appendix IV.) There is no time limit on when the qualified conviction occurred; presumably the court may be asked to resentence offenses that occurred decades ago.

Section 1170.126(b) does not define what constitutes "good cause" for a delay in filing a petition for resentencing. In a Proposition 36 case of first impression, *People v. Drew* (2017) 16 Cal.App.5th 253, 257-258, explained: "The briefs of both parties refer us to case law interpreting section 1382—which contains various time limitations that ensure a defendant receives a speedy trial—suggesting that it may provide at least rough guidance for construing 'good cause' under section 1170.126, subdivision (b). Like section 1170.126, '[s]ection 1382 does not define "good cause" as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay.' (*People v. Sutton* (2010) 48 Cal.4th 533, 546.) The courts have concluded in other contexts that, when making a 'good-cause' determination, a trial court must consider all of the relevant circumstances of the particular case, 'applying principles of common sense to the totality of circumstances.' (See, e.g., *Stroud v Superior Court* (2000) 23 Cal.4th 952, 969.)" [¶] We recognize that the analogy between section 1382 (which is focused on the state's obligation to timely bringing a person to trial) and section 1170.126 (which focuses on an inmate's obligation to commence the recall petition process) is an imperfect one because they involve entirely different phases of the criminal process. But the analogy may provide some guidance because both statutes are concerned with time limits within which certain actions must be taken and under what circumstances a delay beyond those deadlines should be permitted. Under both, delays beyond the deadlines carry consequences, and 'good cause' functions as a barometer to evaluate the excuse for the delay and decide whether to obviate those consequences." Ultimately the court declined to consider the third factor, finding there was no circumstance where the prosecution could be prejudiced by the late filing of a motion for resentencing. The defendant's explanation of the two-year delay was that he did not understand that he had a right to relief. The appellate court affirmed the trial court's determination that such a reason did not constitute the requisite "good cause."

A petition for relief under section 1170.18 may not include a request to reclassify prior felony convictions used to enhance the sentence, at least to the extent the prior convictions were incurred in a different county. The request to reclassify prior convictions must be made in the county where the convictions occurred. (*People v. Marks* (2015) 243 Cal.App.4th 331.)

2. Initial screening of the application; no need for hearing

Proposition 47 expressly authorizes the court to either grant or deny an application for reclassification without hearing, unless one is requested by the applicant. (§ 1170.18, subd. (h).) Certainly there will be a desire to handle these applications summarily whenever possible. Yet, unless the court intends to undertake an investigation into the criminal history of the defendant or whether a theft offense involved more or less than $950, the court will want the assistance of the district attorney or probation department in determining an applicant's eligibility for relief. Even as a matter of due process, however, it would seem the district attorney is entitled to notice of a request for reclassification and an opportunity to be heard.

**Qualification for relief**

An applicant is entitled to relief if he or she has committed a qualified crime and has no disqualifying prior conviction and is not required to register as a sex offender. (§ 1170.18(g).) (For a full discussion of disqualification from the benefits of Proposition 47, see Section III, *supra*.) **The court is not required to determine dangerousness if the crime is reclassified.** Indeed, there is no reason an offender who previously was denied resentencing because of dangerousness would be barred from reclassification after the sentence has been served.

***Prima facie* review**

The screening of the application will be based on the court's file, including the petitioner's record of convictions. The court will be able to summarily deny relief based on any petition that is facially deficient. Reclassification may be denied based solely on the fact of a prior conviction of a designated violent felony or any offense requiring registration as a sex offender under section 290(c). (§ 1170.18(i).) The designated violent felonies are: a "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) (the Sexually Violent Predator Law); oral copulation, sodomy or sexual penetration of a child under 14 and more than 10 years younger than the defendant; a lewd act on a child under 14; any homicide offense, including attempted homicide as defined in sections 187 – 191.5; solicitation to commit murder; assault with a machine gun on a peace officer; possession of a weapon of mass destruction; or any serious or violent offense punishable by life imprisonment or death. (For a full discussion of the offenses requiring exclusion from the benefits of Proposition 47, see Section III, *infra*; for a list of the disqualifying offenses, see Appendix II.)

The initial screening must be limited to a determination of whether the applicant has presented a *prima facie* basis for relief under section 1170.18. At this level

of review, the court should not consider any factual issues such as the value of any property taken regarding any qualified theft crimes.

The initial screening of the petition for reclassification is similar to the initial screening of a petition for writ of habeas corpus. California Rules of Court, Rule 4.551(f) provides that "[a]n evidentiary hearing is required if . . . there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact."

To properly rule on the petition, the court should request a copy of the petitioner's criminal record from the district attorney, the probation department, or CDCR. While most initial screenings may be accomplished with a review of the petitioner's record, there may be circumstances where additional facts will be required. For example, it may not be possible from a review of the record alone to determine the value of property taken. So long as the record review of the petition states a *prima facie* basis for granting relief, however, the court should grant the petitioner a full qualification hearing where any additional evidence could be received on the issue of eligibility. If the district attorney indicates no opposition to the relief, however, no hearing is required.

If the court intends to summarily deny relief based on unadjudicated factors, the court should afford the defendant a meaningful opportunity to address the issue. *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341, a case resolving this issue in the context of Proposition 36 case, is instructive. There, the court held that a hearing is required only where factual disputes are present: "[T]he current matter does not call upon the trial court to consider new evidence in making its determination, which is limited to the record of conviction. Consequently, it is not essential for the court to hold a formal hearing. Considering that the record of conviction is 'set' when the trial court considers a petitioner's eligibility for resentencing, the petitioner would be well-advised to address eligibility concerns in the initial petition for resentencing. But if the petitioner has not addressed the issue and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction . . . , the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing."

**Original sentencing judge**

Unless the requirement is waived, the application must be reviewed by the original sentencing judge, or if that judge is unavailable, by a judge designated by the presiding judge of the court. (§§ 1170.18(f) and (l).) (See *People v. Superior Court (Kaulick)*(2013) 215 Cal.App.4th 1279, 1300 – 1301 [waiver of original sentencing judge in Proposition 36 case].)

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5(p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial'].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion." (*Rodriguez*, at pp. 690-691.)

**Qualification hearing**

If there is a dispute over the eligibility of the applicant for relief, it may be necessary to conduct a full qualification hearing. Such a need may arise where the district attorney seeks to establish that the applicant has a disqualifying prior or that a theft crime involved more than $950.

**Time of hearing**

Because section 1170.18 does not specify a time of hearing, the hearing should be set within a "reasonable time." The petitioner and the prosecutor have the right to notice of, and to appear at, any hearing held in connection with the qualification and reclassification procedure. (See Proposition 36 cases: *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1144.)

**Record of conviction**

Additional documentation or evidence may be presented by the parties which may be relevant to the determination of whether the petitioner meets the minimum statutory requirements of eligibility for resentencing.

The scope of evidence admissible to prove or disprove the petitioner's eligibility for resentencing is not defined by the statute. It is likely the court could consider any documentary evidence that is part of the "record of conviction:" "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens and Bigelow, "California Three Strikes Sentencing," The Rutter Group, § 4:5, pp. 4-14 - 4-35 (2014).) It is not clear, however, whether the court may consider live testimony on behalf of either the defense or prosecution. Such evidence is prohibited in the context of proving a strike. (*Reed*, *supra*, and *People v. Guerrero* (1988) 44 Cal.3d 343.) It is an open question, for example, whether live testimony will be permitted to prove or disprove the value of property taken by the petitioner.

**No right to jury**

The petitioner likely has no right to a jury determination of his eligibility for reclassification. Other courts have determined, in the Proposition 36 context, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, has no application due to the retrospective nature of the petition for resentencing. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331-1336; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1303.)

**Right to counsel**

For a discussion of the right to counsel, see Section VIII, *infra*.

**Role of the victim**

It is uncertain whether Proposition 47 grants the victim the right to participate in the reclassification process. Section 1170.18(o) provides that "[a] *resentencing hearing* ordered under this Act shall constitute a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 or Article I of the California Constitution (Marsy's Law)." (Italics added.) The purpose of Marsy's Law is to ensure that victims have the right to participate in any decision which could result in the post-sentencing release of an offender. Clearly, no one is being "released" as a result of the reclassification process. Furthermore, section 1170.18(h) expressly allows the court to grant the reclassification without any hearing – there is no "resentencing hearing" that would trigger the victim's rights under Marsy's Law.

**Original sentencing judge**

Unless the requirement is waived, the application must be reviewed by the original sentencing judge, or if that judge is unavailable, by a judge designated by the presiding judge of the court. (§§ 1170.18(f) and (l).) (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1300 – 1301 [waiver of original sentencing judge in Proposition 36 case].)

What constitutes "unavailability" of a judge is open to some interpretation. The issue was discussed by the Supreme Court in *People v. Rodriguez* (2016) 1 Cal.5th 676, in the context of relitigating a motion to suppress evidence under section 1538.5(p). The section requires the original judge to conduct the rehearing "if the judge is available." The presiding judge determined the original judge was unavailable because he had been moved to a calendar department in a different city since hearing the original motion. The Supreme Court reversed. The court acknowledged that presiding judges have considerable discretion in determining the availability of judges and how cases are assigned, but the discretion is not unlimited. "Although trial courts have discretion to determine whether a judge is available within the meaning of section 1538.5(p), that discretion must be meaningfully cabined to protect the statutory right of every defendant, if possible, to have the same judge decide any relitigated suppression motion. To that end, we find that mere inconvenience is not sufficient to render a judge unavailable for purposes of section 1538.5(p). (Cf. *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5 (*Arbuckle*) [explaining that 'a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be

thwarted for mere administrative convenience'].) [¶] This is not to say that reviewing courts are now free to second-guess judgment calls that are better left to the trial courts. Trial courts have considerable discretion to administer their logistical affairs, and rightly so: lodged in trial courts is likely the contextual knowledge and motivation to deploy judicial resources effectively, and to learn over time. But to adequately protect a defendant's statutory right under section 1538.5(p), we hold that a trial court must take reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion. Only if the trial court has done so may it make a finding of unavailability. And the trial court must make such a finding on the record, so appellate review proves meaningful. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1063–1064; cf. *Still v. Pearson* (1950) 96 Cal.App.2d 315, 318 ['when a judge other than the one who presided at the trial proceeds to hear the motion for a new trial, it is the best practice, in the interests of certainty and convenience, to cause a record to be made reciting the fact of the inability or absence of the judge who presided at the trial'].) Such a finding, unsupported by record evidence demonstrating the reasonable measures a trial court has taken to honor a defendant's section 1538.5(p) right, is an abuse of discretion." (*Rodriguez*, at pp. 690-691.)

3. Order granting reclassification

If the court grants the request to reclassify the offense as a misdemeanor, thereafter the crime will be treated as a misdemeanor for all purposes except for the right to own or possess firearms. (§ 1170.18(k).)

An optional form of order on an application for reclassification is attached as Appendix VI.

## VIII. Right to counsel

A criminal defendant has a Sixth Amendment right to be represented by counsel at all critical stages of the proceedings in which his substantial rights are at stake. (*People v. Crayton* (2002) 28 Cal.4th 346, 362, citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Sentencing is a stage at which a defendant has a right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.) In determining whether there is a right to counsel, it may be necessary to distinguish between resentencing proceedings, where a petitioner's liberty interest is at stake, and reclassification proceedings, where the sentence has been completed. It may be argued that there is no right to appointed counsel in the latter circumstance since it is no longer a "critical stage of the proceedings." If the right to counsel exists for either procedure, however, entitlement may depend of the particular stage of the proceedings.

*A. Preparation of the petition or application and initial screening*

The procedure under section 1170.18 may be considered comparable to a habeas proceeding where the petitioner's right to counsel does not attach until the court determines petitioner has made a *prima facie* case for relief and issues an order to show cause. (See *In re Clark* (1993) 5 Cal.4th 750, 779 ["[I]f a petition attacking the validity of a judgment states a *prima facie* case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns."].) Therefore, it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening.

*B. The qualification hearing*

Since section 1170.18 allows a person to seek "resentencing" or "reclassification," it would appear the person has a right to counsel in any court proceeding where the merits of the application are considered. There are several aspects of section 1170.18 that seem to support such a conclusion.

First, the trial judge presented with a petition for resentencing must determine whether the person has satisfied the criteria specified in section 1170.18(a), and also must exercise discretion in determining whether other factors outlined in the new law indicate that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§§1170.18(b).)

Second, section 1170.18 indicates proceedings under the new law constitute "a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law)." (§1170.126(o).) Such a designation means any victim in the case has a right to request notice of the hearing, be at the hearing, and present argument if a right of the victim is at issue.

Because in a proceeding under section 1170.18 (1) the court exercises its discretion in deciding whether to resentence the petitioner or reclassify the offense, and (2) the court makes such a decision at a scheduled hearing during which the victim and prosecutor may present argument against the petitioner, it would appear the procedure is one in which the petitioner's substantial rights are at stake and thus there is a right to counsel.

The process for providing appointed counsel should be practical, tailored to the realities of the circumstances. It would be wasteful of court time and resources to schedule court hearings for the purpose of determining whether a petitioner or applicant desires an attorney. Courts may find it most productive to refer all *pro se* petitions to the public defender, which, in turn, would make personal contact with the individual.

*C. The resentencing*

Petitioner has a right to the assistance of counsel for the actual resentencing stage of the proceedings. (*People v. Rouse* (2016) 245 Cal.App.4th 292.) The right attaches even though the petitioner has waived his appearance for the proceedings. As noted above, sentencing is a stage at which a defendant has a constitutional right to counsel. (See *Clemensen v. Municipal Court* (1971) 18 Cal.App.3d 492, 499.) A petitioner also has the right of self-representation at the resentencing proceeding; the right, however, is waivable. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98.)

## IX. Application to the Three Strikes law

Proposition 47 potentially effects the Three Strikes law in a number of respects. First, persons serving second strike sentences for crimes that are made misdemeanors under this act may petition for resentencing. In contrast, Proposition 36 limits its resentencing provisions to persons serving third strike sentences. This is subject, of course, to the court's determination of whether the petitioner will pose an unreasonable risk of danger to public safety if resentenced.

Second, Proposition 47 allows qualified third strike offenders to be resentenced as misdemeanants. While Proposition 36 only permits resentencing as a second strike offender, Proposition 47 requires qualified persons to receive a misdemeanor sentence, without any consideration of a further prison term either as a second strike or non-strike offender. Again, the court may deny the petition if the person poses an "unreasonable risk of danger to public safety," as that phrase is defined in the more restrictive provisions of Proposition 47.

If the defendant had been sentenced as a strike offender under the Three Strikes law, but is resentenced as a misdemeanant, custody credits should be calculated using the traditional formula under section 2933 (50% credit), not the more restrictive formula specified by section 1170.12(a)(5) (20% credit).

Third, there was a question whether Proposition 47 amends Proposition 36 in a manner that allows a greater number of third strike offenders to be resentenced as second strike offenders. As originally enacted by the voters, Proposition 36 allows a court to refuse resentencing of any person if to do so would create an "unreasonable risk of danger to public safety." Because Proposition 36 did not further define that phrase, courts are given broad discretion to determine what degree of danger a particular petitioner may pose. Proposition 47 limits the court's ability to deny a petition based on dangerousness to those cases where a defendant is at risk of committing a "super strike." The initiative imposes its more restrictive definition of "unreasonable risk of danger to public safety" *wherever that phrase is "used throughout this Code*." (§ 1170.18(c).) There is a question whether the phrase means the entire Penal Code,

including section 1170.126 for resentencing of third strike offenders, or whether it will be limited to petitions for resentencing under section 1170.18. If Proposition 47's definition applies to resentencing under Proposition 36, in determining whether a third strike offender poses an unreasonable risk if resentenced, the court is limited to determining whether there is an unreasonable risk that the petitioner will commit any of the designated violent felonies – the "super strikes," specifically: specified violent sex offenses or any sex offense requiring registration as a sex offender; murder, attempted murder, or solicitation to commit murder; assault with a machine gun on a police officer; possession of a weapon of mass destruction; or any serious or violent felony punishable by death or life imprisonment. (See Appendix V for a complete list of offenses.) Unless the court determines the petitioner is likely to commit one of the specified offenses, Proposition 36, if amended by Proposition 47, does not permit the court to consider the risk of the person committing other serious or violent crimes.

The issue was resolved by the Supreme Court in *People v. Valencia* (2017) 3 Cal.5th 808 [*Valencia*]. The court rejected the application of the Proposition 47 definition to Proposition 36 based on the following reasons: "First, the phrase '[a]s used throughout this Code' in section 1170.18, subdivision (c), when considered in the context of both section 1170.18 and other provisions of Proposition 47 as a whole, renders the entirety of section 1170.18, subdivision (c) ambiguous as to its potential application to the resentencing criteria for the Three Strikes Reform Act. Second, the ballot materials for Proposition 47 supplied no notice to voters that the measure intended to amend the resentencing criteria of the Three Strikes Reform Act and that three strike inmates previously convicted of serious or violent felonies could be released as a consequence. Third, despite creating detailed procedures for the resentencing of low-level felons to misdemeanants, Proposition 47 provided no similar procedural guidance for the resentencing of three strike inmates under its definition of 'unreasonable risk of danger to public safety,' which further detached any perceived connection with the Three Strikes Reform Act. Finally, under the circumstances of this matter, it is unreasonable to assign dispositive significance to the legal presumptions we normally apply to voters who approve an initiative in order to interpret the phrase '[a]s used throughout this Code.' Those presumptions, even if applicable, would not alter our conclusion that the statutory language is ambiguous and that this ambiguity should be resolved by construing section 1170.18, subdivision (c) not to apply to petitioners under other provisions of the Penal Code such as the Three Strikes Reform Act. Furthermore, as we will explain, neither the initiative's text nor its supporting materials describe any intention to amend the criteria for the resentencing of recidivist serious or violent felons, and both the Attorney General, who is required by law to summarize ballot measures, and the Legislative Analyst, who is required by law to provide and explain to voters a measure's potential impacts, did not interpret the phrase '[a]s used throughout this Code' as referring to the sentencing criteria for the Three Strikes Reform Act. Given these circumstances, it is unreasonable to assume or presume that voters, with greater acumen than the legal professionals of the offices of the Attorney General and Legislative Analyst, somehow discerned a connection with the Three Strikes Reform Act.

Thus, those legal presumptions provide no assistance in determining whether such a connection existed." (*Valencia*, pp. 356-357.)

**No retroactive application**

*People v. Chaney* (2014) 231 Cal.App.4th 1391, holds Proposition 47's new definition of "unreasonable risk of danger to public safety" does not apply to petitions for resentencing under Proposition 36 decided prior to November 5, 2014. "'No part of [the Penal Code] is retroactive, unless expressly so declared.' (§ 3.) The California Supreme Court 'ha[s] described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying "the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application."' (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) 'In interpreting a voter initiative, we apply the same principles that govern our construction of a statute.' (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)" (*Chaney*, at p. 1396.) The court expressly rejected any application of *In re Estrada* (1965) 63 Cal.2d 740. "Expanding the *Estrada* rule's scope of operation here to the definition of 'unreasonable risk to public safety' in Proposition 47 in a petition for resentencing under the Act would conflict with 'section 3['s] default rule of prospective operation' where there is no evidence in Proposition 47 that this definition was to apply retrospectively to petitions for resentencing under the Act and would be improper given that the definition of 'unreasonable risk to public safety' in Proposition 47 does not reduce punishment for a particular crime. For these reasons, we hold that the definition of 'unreasonable risk to public safety' in Proposition 47 does not apply retroactively to a defendant such as the one here whose petition for resentencing under the Act was decided before the effective date of Proposition 47." (*Chaney*, at p. 1398.)

The Supreme Court granted review of *Chaney* to examine whether Proposition 47 modifies the definition of dangerousness in Proposition 36, and whether the decision applies retroactively. *Chaney* was joined with the decision in *Valencia*, above. Because it found Proposition 47 did not amend Proposition 36, the court found no reason to decide the retroactivity issue and dismissed the appeal.

## X. Appellate review

Appellate courts were in conflict over the issue of the proper vehicle to review the summary denial of a petition for resentencing under Proposition 36. The primary issue was whether a summary denial is appealable or whether the aggrieved party must proceed by writ. The conflict has been resolved by the Supreme Court in *Teal v. Superior Court* (2014) 60 Cal.4th 595. The summary denial of a petition for resentencing under section 1170.126 is an appealable order under section 1237(b). There is nothing

in Proposition 47 that suggests any different result for petitions or applications brought under section 1170.18.

An appeal to challenge the grant or denial of a petition or application under section 1170.18 must be heard by the Court of Appeal, not the appellate division of the superior court. "[I]f a defendant is charged with at least one felony in an information, an indictment, or in a complaint that has been certified to the superior court under section 859a, . . . it is a felony case and appellate jurisdiction properly lies with this court." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1094-1095; *People v. Lynall* (2015) 233 Cal.App.4th 1102.)

**Standard of review**

The denial of resentencing based on dangerousness is reviewed under the "abuse of discretion" standard. "Defendant argues the trial court's decision regarding dangerousness should be reviewed for substantial evidence. We disagree. The plain language of subdivisions (f) and (g) of section 1170.126 calls for an exercise of the sentencing court's discretion. " 'Discretion is the power to make the decision, one way or the other.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375, 14 Cal.Rptr.3d 880, 92 P.3d 369.) "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. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125, 36 Cal.Rptr.2d 235, 885 P.2d 1; see *People v. Williams* (1998) 17 Cal.4th 148, 162, 69 Cal.Rptr.2d 917, 948 P.2d 429 [abuse-of-discretion review asks whether ruling in question falls outside bounds of reason under applicable law and relevant facts].)" (*People v. Payne* (2014) 232 Cal.App.4th 579, 591, depublished on grant of review, rev. dismissed; footnote omitted.) In accord with *Payne* are *People v. Hall* (2016) 247 Cal.App.4th 1255, 1263–1264, and *People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.

**Relief by appellate court**

*People v. Awad* (2015) 238 Cal.App.4th 215, acknowledged the Hobson's choice facing defense counsel: either abandon a potentially meritorious appeal and proceed with a motion under section 1170.18 which could effect an early release of the defendant, or await the results of the appeal, then file the motion if the conviction is affirmed. The latter approach is suggested by *Lopez*, which observed that the appellate status of the case would constitute "good cause" for a delayed filing under section 1170.18(j). (*Lopez*, at p. 182.) *Awad*, however, holds that appellate courts have the discretion to make a limited remand to the trial court under section 1260, expressly for the purpose of considering a motion under section 1170.18. (*Awad*, at p. 222.)

Whether the trial court has some form of concurrent jurisdiction with the appellate court for the purpose of hearing a motion under section 1170.18 is also addressed in *People v. Scarbrough* (2015) 240 Cal.App.4th 916. In relying on the Proposition 36 case of *People v. Yearwood* (2013) 213 Cal.App.4th 161, the court concluded the trial court does not have jurisdiction to consider a direct application under section 1170.18 once the case is on appeal. The court observed, however, that the defendant could apply to the appellate court for a stay of the sentence for the Proposition 47-eligible offense – only a partial solution to the defendant's problems because he would have to serve the misdemeanor sentence once the appeal had been completed. (*Scarbrough*, at p.929, fn. 4.) Additionally the court distinguished *Awad* because the defendant there did not request a limited remand for the purpose of a section 1170.189 motion. (*Scarbrough*, p. 929, fn.5.)

## XI. Additional issues

### *A. Refund of fees and fines*

It is not entirely clear whether a court must refund any felony fees or fines paid by a defendant who obtains a resentencing or reclassification. The answer may depend on the nature of the assessment and whether the person is currently serving the sentence. With respect to persons who have completed their sentence, the remedy afforded under section 1170.18 is not unlike relief granted under section 17(b)(3) ("[The crime] is a misdemeanor for all purposes under the following circumstances: . . . (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.") When such relief is granted, felony fees and fines are not refunded. As observed by the Supreme Court, a reduction to a misdemeanor "for all purposes" under section 17(b) does not apply retroactively. (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439; *People v. Banks* (1959) 53 Cal.3d 370, 381-382; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1094-1095.) Furthermore, there is nothing in the express language of Proposition 47 that compels such a refund. A request for refund of fees and fines under these circumstances should be denied.

The court may have a different obligation to persons who are currently serving a sentence. There may be a duty, upon request of the defendant, to recompute the fees and fines based on a misdemeanor disposition. It does not seem likely that the court will be able to continue collection of fees and fines based on a felony conviction after the conviction has been reduced to a misdemeanor. If recomputation is required, the determination of the correct fee likely will depend on the nature of the assessment. If the assessment is a "fine," such as with section 1203.4(b), it should be computed at the rate set at the time the crime was committed. If the assessment is an "administrative cost," such as the court operations assessment under section 1465.8, then the current

fee would be the current assessment. The complexities of the recalculation process may encourage courts, counsel, and county administration to agree to a different method of calculation.

Whether the court has the duty to refund any fees and fines already collected from the person who is currently serving a sentence is an open question without any clear answer. Again, drawing on the analogy to motions under section 17(b)(3), these persons likely will not be entitled to any refund.

In determining whether a recomputation of fees and fines is necessary, it is also important for the court to understand that unless a particular fee is only applied to a felony conviction, any particular fee or fine may be within the range otherwise authorized by statute. For example, section 1203.4(b) provides for a restitution fine for any felony or misdemeanor conviction. If the offense is a felony, the minimum assessment is currently $300; if it is a misdemeanor, the minimum assessment is currently $150, but may be up to $1,000. An assessment of $300 for a misdemeanor, therefore, is well within the court's discretion; it is not an *unauthorized* sentence. Under similar circumstances, the court in *Alejandro N. v. Superior Court (People)* (2015) 238 Cal.App.4th 1209, denied a recovery of fees in a juvenile proceeding because the assessment was already within proper limits for a misdemeanor. Nevertheless, if the computation of the original fine was based on the status of the crime as a felony, likely the court will need to exercise its independent judgment to impose a misdemeanor fine that is higher than the statutory minimum.

**Application of excess custody credits to fees and fines**

The resentencing of a felony count may result in a defendant having excess custody credits when applied to the new sentence. The excess credits may be applied to reduce certain fees and fines. (§ 2900.5(a).) For crimes committed after July 2013, the credit may apply to all fines except for a restitution fine imposed under section 1202.4. (*People v. Morris* (2015) 242 Cal.App.4th 94.)

*B. Cases transferred to different county*

Probation cases and cases where the defendant is serving a period of mandatory supervision under section 1170(h) may be transferred to the defendant's county of residence under section 1203.9. Appellate decisions were in conflict regarding the proper venue for the filing of a petition for resentencing under section 1170.18, subdivision (a), when the case has been transferred to a new county under section 1203.9. The Supreme Court, In *People v. Adelmann* (2018) 4 Cal.5th 1071 (*Adelmann*), has determined the proper court for filing of the resentencing petition is in the county of the original sentencing court. "Under the resentencing statute, a person 'who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense *may* petition for a recall of sentence before the

trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with' Proposition 47. (§ 1170.18, subd. (a), italics added.) The word 'may' is 'usually permissive' (*Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133), but use of that word here refers to what a person eligible for resentencing may do. A defendant is not required to seek relief, but if he or she chooses to do so, the statute directs that a resentencing petition be filed in the original sentencing court." (*Adelmann*, at p. 1078.)

*C. Persons committed under section 1368*

If a person is committed to the Department of State Hospitals (DSH) as a felon under section 1368 for a crime now designated a misdemeanor, likely the court will be required to recommit the defendant to a county competence program. Whether the defendant is being prosecuted for a felony or misdemeanor will have a significant impact on the level of treatment available for restoration of competence. For example, misdemeanor offenders are treated locally, often on an out-patient basis, and rarely are placed under the jurisdiction of the DSH. (See § 1370.01(a)(2)(A): "No person shall be admitted to a state hospital under this section [governing misdemeanors] unless the county mental health director finds that there is no less restrictive appropriate placement available and the county mental health director has a contract with the State Department of State Hospitals for these placements.") Because of the dramatic difference in placement, it may be proper to file a motion for reconsideration of the felony commitment order based solely on the change in the potential penalty.

It seems there is no issue regarding the jurisdiction of the court to change a defendant's placement. Section 1368(c) provides that when a doubt arises in the mind of the trial judge as to the mental competence of the defendant, "all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." "[O]nce a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction *to proceed with the case against the defendant* without first determining his competence in a section 1368 hearing, and the matter cannot be waived by defendant or his counsel." (*People v. Hale* (1988) 44 Cal.3d 531, 541; italics in original.) The rule against proceeding, however, is not absolute. *People v. Stankewitz* (1990) 51 Cal.3d 72, 85–90, approved the substitution of defendant's counsel while the case had been suspended. Likely the court has jurisdiction to enter orders that pertain to placement and treatment and do not cause the prosecution of the case to move forward.

If the only committing crime is a Proposition 47-eligible offense, the court should promptly notify DSH of the change of status so that the individual can either be returned to the local jurisdiction for handling as a misdemeanant, or taken off any waiting list,

*D. Prison priors under section 667.5(b)*

**Note: Effective January 1, 2020, prison priors may only be charged as an enhancement under section 667.5, subdivision (b), if the prison term was for "a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. . ., " predicate offenses for the application of the Sexually Violent Predator law.**

Section 667.5(b) provides for an enhancement of one year for any sentence to state prison or under section 1170(h) "for each prior separate *prison term* or *county jail term* imposed under subdivision (h) of section 1170 or when sentence is not suspended for any felony. . . ." (Italics added.) *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), determined that if the underlying felony conviction which resulted in the prison term is reduced to a misdemeanor, The prior prison term enhancement may no longer be used. "[B]ased on established presumptions we apply to measures designed to ameliorate punishment, a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect. In addition, finality aside, a defendant who successfully petitions for resentencing on a current Proposition 47 eligible conviction may, at the time of resentencing, challenge a felony-based enhancement contained in the same judgment because the prior felony conviction on which it was based has since been reduced to a misdemeanor." (*Buycks*, at p. 879.) "[T]he resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. A successful Proposition 47 petition or application can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction because the defendant 'would have been guilty of a misdemeanor under' the measure had it 'been in effect at the time of the offense.' (§ 1170.18, subds. (a), (f).) Therefore, if the 'felony conviction that is recalled and resentenced ... or designated as a misdemeanor' conviction becomes 'a misdemeanor for all purposes,' then it can no longer be said that the defendant "was previously convicted of a felony" (People v. Tenner, supra, 6 Cal.4th at p. 563, 24 Cal.Rptr.2d 840, 862 P.2d 840), which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, 'for all purposes,' it can only be said that the defendant was previously convicted of a misdemeanor." (*Buycks*, at p. 889.)

Generally in accord with *Buycks* are *People v. Call* (2017) 9 Cal.App.5th 856, *People v. Warren* (2018) 24 Cal.App.5th 899, 910 (*Warren*), *People v. Kelly* (2018) 28 Cal.App.5th 886, and *People v. Baldwin* (2018) 30 Cal.App.5th 648, which hold that if the crime that forms the basis of the prior prison term is specified as a misdemeanor under the Act prior to sentencing, the enhancement is eliminated. These decisions are based on the language in the Act that says that after resentencing, the crime is a "misdemeanor for all purposes." (§ 1170.18(k).) *Warren* and *Kelly* also hold that reduction of the prior felony to a misdemeanor also eliminates the use of that conviction for the purposes of the five-

year "washout" under section 667.5, subdivision (b). "To summarize: (1) A goal of Proposition 47, when a prior offense is found pursuant to a Proposition 47 petition not to be worthy of treatment as a felony, is to relieve the defendant of the burden of a felony conviction, including the burden of a felony sentence. (2) Despite its literal terms, section 667.5, subdivision (b), manifests no intent inconsistent with this goal of Proposition 47. (3) Therefore, the washout provision of section 667.5, subdivision (b), should be construed to allow a prior felony to wash out provided it is followed by a five-year period free of felony convictions and incarceration in prison or in county jail pursuant to section 1170, subdivision (h), except that such incarceration shall not prevent the prior felony from washing out if it was imposed for an offense that has been designated a misdemeanor or resentenced as a misdemeanor pursuant to a petition filed under section 1170.18." (*Warren*, at p. 917.)

If the defendant has not been sentenced on a new felony offense – the case is still open – the resentencing of the prior offense as a misdemeanor will eliminate the enhancement. In *People v. Abdullah* (2016) 246 Cal.App.4th 736, the defendant previously had been convicted and sentenced to prison on a drug offense. He thereafter committed a second felony and was sentenced to prison on that charge. Prior to the second sentencing, however, the trial court resentenced the defendant on the drug case as a misdemeanor under the provisions of Proposition 47. The trial court nevertheless added a one-year term under section 667.5(b) for the drug case. The appellate court reversed. *Abdullah* held that because the trial court granted the request to resentence the drug case as a misdemeanor prior to the sentencing on the second case, the defendant no longer stood convicted of a felony – it was a misdemeanor for all purposes, including for the purposes of the enhancement under section 667.5(b).

Even though the defendant has been sentenced as a felon, with the prior prison term enhancement, he may nevertheless obtain the benefits of Proposition 47 if at the time of defendant's request for relief under section 1170.18(k), the sentence is not final. (*People v. Evans* (2016) 6 Cal.App.5th 894.) *Evans* determined under these circumstances the case of *In re Estrada* (1965) 63 Cal.2nd 740, applies to the sentencing. (*Evans*, at p. 904.)

If the *adjudication* of the prior prison term occurs *after* the reduction of the underlying crime as a misdemeanor, the prior prison term enhancement may no longer be used because the underlying felony is then a misdemeanor for all purposes. In *People v. Kindall* (2016) 6 Cal.App.5th 1199, the defendant was convicted of aggravated battery with three prior prison terms for Proposition 47-eligible drug offenses. After the verdict on the assault charge, but prior to the bifurcated court trial on the priors, another court specified the drug charges as misdemeanors under section 1170.18. Because the adjudication of prison terms occurred after the reduction of the underlying convictions to a misdemeanor, they could no longer serve as a basis for an enhancement under section 667.5(b).

To be subject to the enhancement under section 667.5(b), the person must meet the conditions imposed by section 667.5(g): "A prior separate prison term for the purposes of this section shall mean a continuous *completed period of prison incarceration* imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration." (Italics added.) For the purposes of the enhancement, a prison term on a qualified felony is considered "completed" even if the defendant is discharged because of the resentencing of the crime as a misdemeanor. The requirement of having a completed sentence is to distinguish separate periods of incarceration from overlapping periods of custody imposed in different cases.

If the defendant is sentenced on only one felony, but with a section 667.5(b) prior prison term, and the base-term felony is reduced under Proposition 47 to a misdemeanor, the enhancement must be struck at the time of resentencing. Enhancements only attach to felony charges; to impose an enhancement, such as under section 667.5(b), on a misdemeanor would be an unauthorized sentence.

*E. DNA samples*

Section 296(a)(2)(C) provides for the collection of DNA samples from an adult arrested or charged with a felony. Collection is also required from juveniles who are adjudicated for any felony offense. (§ 296(a)(1).) *Alejandro N. v. Superior Court (People)* (2015) 238 Cal.App.4th 1209 (*Alejandro N*.), holds that if a felony juvenile adjudication is reduced to a misdemeanor under section 1170.18, the DNA sample must be expunged from the data base. "As noted, Proposition 47 made its misdemeanor reclassification benefit available to eligible offenders on a retroactive basis by adding section 1170.18 to the Penal Code. Section 1170.18, subdivision (k) expressly addresses the impact of an offender's successful reclassification of his or her felony offense to a misdemeanor, stating: 'Any felony conviction that is recalled and resentenced . . . or designated as a misdemeanor . . . *shall be considered a misdemeanor for all purposes, except that* such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the firearm restriction statutes].' (Italics added) ….) [¶] The plain language of section 1170.18, subdivision (k) reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so." (*Alejandro N*., at p.1227.) Because the court found no applicable exceptions, the DNA sample was ordered expunged (unless some other basis supported it).

However, effective January 1, 2016, the Legislature amended sections 298 and 299 to address the retention issue. There are two versions of the legislation, depending on the final outcome of certain cases pending before the California Supreme Court. Under either version of the legislation, the amendments make clear that the Proposition 47 reduction of a felony conviction or adjudication to a misdemeanor does not relieve the offender of the duty to provide a database sample: "Notwithstanding any other law, including Sections . . . 1170.18, . . . , a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter . . . ." (§ 299(f).)

*In re J.C.* (2016) 246 Cal.App.4th 1462, decided after the statutory change, reached a conclusion opposite that of *Alejandro N*. The appellate court held the 2016 amendment "clarifies, rather than changes, the meaning of the relevant provisions of Proposition 47, [and thus] precludes the granting of requests for expungement made prior to its enactment." (*Id.* at p. 1467–1468.) The court concludes that the purpose of the legislation is "to prohibit trial courts, when granting a petition to recall a sentence under section 1170.18, from expunging the record of a DNA sample provided by the defendant in connection with the original felony conviction." (*Id*. at p. 1472.) "Thus, [the legislation] has the effect of abrogating the holding of *Alejandro N.* by precluding the expungement of DNA records in connection with sentence recall under section 1170.18." (*Id*. at p. 1475.) Because the 2016 amendment to section 299 reflects a clarification of preexisting law, rather than a change, it applies with equal force to felony convictions and adjudications that occurred before 2016, but which are later reduced to misdemeanors. (*Id*. at pp. 1479–1480.)

Similarly, in *People v. Harris* (2017) 15 Cal.App.5th 47, the court found the changes made to section 299(f) eliminated the ability of the defendant to obtain an expungement of the DNA sample. The defendant had been arrested for a felony violation of grand theft person (§ 487(c)). A DNA sample was taken at the time of her arrest. She thereafter obtained a reduction of the felony conviction to a misdemeanor under section 1170.18. The trial court's denial of her request for expungement of the DNA sample was affirmed on appeal. "Under the plain meaning of subdivisions (b) and (f) of section 299, Harris is not entitled to DNA expungement because she has a past qualifying offense under section 296, subdivision (a) — i.e., she was convicted of an offense that qualified her for inclusion in the DNA database when her DNA sample was collected. The subsequent reclassification of her offense to a nonqualifying offense does not change the fact that at the time her DNA sample was taken, the taking was lawful because it was based on an offense that qualified for DNA submission." (*Harris*, at p. 55.)

The California Supreme Court resolved some of the constitutional issues involving involuntary DNA sampling in *People v. Buza* (2018) 4 Cal.5th 658 (*Buza*). The court observed: "Defendant raises a number of questions about the constitutionality of the DNA Act as it applies to various classes of felony arrestees. But the question before us is a narrower one: Whether the statute's DNA collection requirement is valid as applied to

an individual who, like defendant, was validly arrested on 'probable cause to hold for a serious offense'—here, the felony arson charge for which defendant was ultimately convicted—and who was required to swab his cheek as 'part of a routine booking procedure' at county jail. [Citation.] Under the circumstances before us, we conclude the requirement is valid under both the federal and state Constitutions, and we express no view on the constitutionality of the DNA Act as it applies to other classes of arrestees." (*Buza*, at p. 665.) The court's opinion was based primarily on the decision of the United States Supreme Court in *Maryland v. King* (2013) 569 U.S. 435.

*In re C.B.* (2018) 6 Cal.5th 118 (*C.B.*), addresses the application of the DNA data base statute to minors who originally were adjudicated for felonies, but who later obtained a redesignation of the crimes as misdemeanors based on the enactment of Proposition 47. Because the offenses are now misdemeanors, argued petitioners, there is no longer a requirement to submit to DNA testing and any sample previously obtained should be expunged. The Supreme Court disagreed: "In an important particular, the current scheme operates as it has since the databank's inception: a showing of changed circumstances eliminating a duty to *submit* a sample is an insufficient basis for *expungement* of a sample already submitted. As Coffey v. Superior Court (2005) 129 Cal.App.4th 809, 823, 29 Cal.Rptr.3d 59, explained, the DNA Act does not 'permit expungement of the DNA profile (or destruction of the samples or specimens) merely because [a] charge was subsequently reduced to a misdemeanor: the [Act] permits expungement only on limited grounds.' A petitioner must demonstrate one of four specific conditions: (1) charges were either not filed or were dismissed, (2) charges resulted in an acquittal, (3) any conviction was reversed and the case dismissed, or (4) the petitioner was found factually innocent. (§ 299, subd. (b)(1)-(4).) The applicant must request expungement in writing, with copies to the DNA Laboratory of the Department of Justice, the trial court, and the prosecuting attorney. (§ 299, subds. (b), (c)(1).) Thereafter, the applicant must make 'the necessary showing at a noticed hearing.' (*Id.*, subd. (c)(2).) The court has discretion to determine whether that showing is sufficient. (*Id.*, subd. (c)(1).) The Department of Justice is obligated to expunge a sample only after receiving a court order directing that action, along with documentary proof that one of the four conditions for expungement has been satisfied. (*Id.*, subd. (c)(2)(B), (D).) Coffey was decided before Proposition 47 was passed. The question here is whether Coffey remains good law. We conclude that it does." (*C.B., supra,* 6 Cal.5th at p. 128, italics in original.)

The court expressly disapproved *Alejandro N.* To the extent it authorized expungement of a person's DNA based solely on the enactment of Proposition 47. (*C.B., supra*, 6 Cal.5th at p. 130.)

*F. Plea bargains*

*T.W. v. Superior Court* (2015) 236 Cal.App.4th 647, holds the resentencing provisions of Proposition 47 apply to convictions of qualified offenses obtained through a plea bargain. In accord is *People v. Dunn* (2016) 248 Cal.App.4th 518, 525-526. A number of

appellate cases have addressed the question of whether the prosecution can withdraw from a plea agreement if the defendant is subsequently successful in obtaining a resentencing of a felony as a misdemeanor. The issue is addressed by the Supreme Court in *Harris v. Superior Court (People)* (2016) 1 Cal.5th 984 (*Harris*).

Defendant was initially charged with a robbery with a prior strike. He ultimately reached a negotiated disposition for a plea to a grand theft person, with the prior strike, for a stipulated prison term of six years. Following the passage of Proposition 47, he successfully petitioned for resentencing of the grand theft as a misdemeanor. The trial court, however, then allowed the prosecution to withdraw from the plea agreement because they had been denied the benefit of their bargain.

The Supreme Court framed the issue: "We must decide whether the result of [*People v. Collins* (1978)] 21 Cal.3d 208, 145 Cal.Rptr. 686, 577 P.2d 1026 (allowing a party to rescind a plea agreement when a subsequent change in the law deprives it of the benefit of its bargain), or the rule of *Doe v. Harris* [(2013)] 57 Cal.4th 64, 158 Cal.Rptr.3d 290, 302 P.3d 598 (later changes in the law can affect a plea agreement), applies here. Critical to this question is the intent behind Proposition 47. As we explained in *Doe v. Harris*, *supra*, 57 Cal.4th at page 66, 158 Cal.Rptr.3d 290, 302 P.3d 598, entering into a plea agreement does not insulate the parties 'from changes in the law that *the Legislature has intended to apply to them*.' (Italics added.) Here, of course, it was not the Legislature, but the electorate, that enacted Proposition 47. So the question is whether the electorate intended the change to apply to the parties to this plea agreement. We conclude it did." (*Harris*, at p. 991, italics in original.)

In concluding that the prosecution is not entitled to withdraw from a plea bargain under these circumstances, the court observed: "The resentencing process that Proposition 47 established would often prove meaningless if the prosecution could respond to a successful resentencing petition by withdrawing from an underlying plea agreement and reinstating the original charges filed against the petitioner. Many criminal cases are resolved by negotiated plea. 'Plea negotiations and agreements are an accepted and "integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." [Citations.] Plea agreements benefit that system by promoting speed, economy, and the finality of judgments.' (*People v. Segura* (2008) 44 Cal.4th 921, 929, 80 Cal.Rptr.3d 715, 188 P.3d 649.) Nothing in Proposition 47 suggests an intent to disrupt this process." (*Harris*, at p. 992.)

Generally in accord with *Harris* are *People v. Dunn* (2016) 248 Cal.App.4th 518, 527–532; *People v. Gonzalez* (2016) 244 Cal.App.4th 1058; *People v. Brown* (2016) 244 Cal.App.4th 1170; and *People v. Perry* (2016) 244 Cal.App.4th 1251. In all four cases, review was granted and dismissed in light of *Harris*. Only *Dunn* remains published; *Gonzales*, *Brown*, and *Perry* were all depublished on grant of review.

*G. Application of the "dangerousness" standard to parole hearings*

Section 3041 governs the circumstances under which a parole date is set for an inmate. Section 3041(b) provides, in relevant part: "The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that *consideration of the public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (Italics added.) Proposition 47 imposes its definition of "unreasonable risk of danger to public safety" wherever that phrase is "used throughout this Code," meaning the Penal Code. (§ 1170.18(c).) It is clear that the language of section 3041(b) referencing public safety does not track the exact phrase as used in section 1170.18(c). However, a substantially similar phrase is used in the regulations implementing section 3041. California Code of Regulations, section 2281(a) requires the parole authority to determine whether the inmate poses "an unreasonable risk of danger to society if released from prison." The phrase has been acknowledged in cases interpreting section 3041. (See, *e.g.*, *In re Lawrence* (2008) 44 Cal.4th 1181, 1203; *In re Shaputis* (2008) 44 Cal.4th 1241, 1256-1257.) It can be reasonably expected that courts will receive petitions for a writ of habeas corpus seeking to impose the new definition of dangerousness on parole decisions.

*H. Felony warrants; failure to appear*

When a defendant fails to appear on a felony prosecution, the court's standard response is to issue a felony warrant for the defendant's arrest. Frequently the district attorney will file a felony complaint under sections 1320(b) or 1320.5 for the failure to appear. If the underlying offense is now a misdemeanor under Proposition 47, there is a question about how the court should proceed. It is unlikely the court will be required to recall the felony warrants previously issued – there is no question as to their validity when issued. When the defendant is taken into custody on the warrant, however, he or she may be entitled to a bail setting based on the misdemeanor that is the underlying crime. It is likely also that the prosecution of the case will proceed as a misdemeanor.

Courts should be advised to revise their current bail schedules to account for the new penalties. (§ 1269b(c).)

*I. Mixed counts*

Many defendants will be convicted of a mixture of Proposition 47 eligible and non-eligible offenses. So long as the defendant does not have a disqualifying "super strike" prior conviction and is not required to register as a sex offender under section 290(c), there is nothing in Proposition 47 that would prohibit the defendant from petitioning or applying for relief under section 1170.18 as to crimes that are qualified. If relief is

granted, the court simply should recompute any remaining sentence to be served with the qualified crime now specified as a misdemeanor.

*J. Ability to apply for certificate of rehabilitation (§ 4852.01)*

A person who successfully obtains a resentencing or reclassification of a Proposition 47 crime as a misdemeanor will not thereafter be able to apply for a certificate of rehabilitation under section 4852.01. Section 4852.01(b) provides: "Any person *convicted of a felony* who, on May 13, 1943, was confined in a state prison or other institution or agency to which he or she was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of this chapter." (Italics added.) Section 4852.01 is no longer available to the defendant because "[a]ny felony conviction that is recalled and resentenced under [section 1170.18] *shall be considered a misdemeanor for all purposes*. . . ." (§ 1170.18(k); italics added.)

The effect of the phrase "shall be a misdemeanor for all purposes," in the context of an application for a certificate of rehabilitation, is discussed in *People v. Moreno* (2014) 231 Cal.App.4th 934. *Moreno* observed: "Here, in June 2010, Moreno petitioned the superior court under section 1203.4 to reduce his offenses to misdemeanors and dismiss them. The court granted Moreno's request, and under section 17, subdivision (b)(3) his convictions are now misdemeanors for all purposes. Section 17, subdivision (b)(3) provides in relevant part, 'When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail . . . or by fine or imprisonment in the county jail, it is a misdemeanor *for all purposes* . . . [¶][w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, *or on application of the defendant* or probation officer thereafter, the court declares the offense to be a misdemeanor.' (Italics added.) In other words, the reduction of Moreno's crimes from felony offenses to misdemeanors for all future purposes changed their status, and they were no longer felonies. (*People v. Wilson* (1943) 59 Cal.App.2d 610, 611.) Once a court designates an offense as a misdemeanor for all purposes, a defendant is no longer considered a convicted felon. (*Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1485 [where felony conviction (discharging firearm in grossly negligent manner) had been reduced to misdemeanor for all purposes under section 17, subdivision (b)(3), defendant could not be denied teaching credential under Education Code section 44346.1 based on conviction of serious felony]; *People v. Gilbreth* (2007) 156 Cal.App.4th 53, 57 [where predicate felony conviction (evading officer) had been reduced to misdemeanor for all purposes under section 17, subdivision (b)(3), defendant could not be convicted of possession of firearm by convicted felon based on that conviction].) [¶] The plain language of section 17, subdivision (b) unambiguously states that an offense is a misdemeanor for all purposes when the court grants probation without imposing sentence, and later declares the offense to be a

misdemeanor. Here, after successfully completing probation, Moreno applied in 2010 to reduce his felony convictions to misdemeanors. The San Mateo County Superior Court granted Moreno's petition, declared the crimes misdemeanors for all purposes, and dismissed them. The decision to deny Moreno's 2012 petition for rehabilitation and pardon was statutorily correct because once Moreno's felony charges were reduced to misdemeanors, he was no longer within the purview of section 4852.01." (*Moreno*, at pp. 940-941.) The court also found there was no denial of equal protection of the law. (*Id.* at pp. 941-943.)

Because sections 17(b)(3) and 1170.18(k) share the same phrasing, *Moreno* likely will apply to persons who apply for relief under Proposition 47.

*K. Application to section 12022.1 (out-on-bail enhancement)*

Section 12022.1 provides a two-year status enhancement for any person convicted of a felony who is sentenced to state prison or jail under section 1170(h), having committed that offense while on bail or his own recognizance for another felony. *People v. Buycks* (2018) 5 Cal.5th 857, 890-891, discusses the application of the out-on-bail enhancement when either the primary or secondary offense has been specified as a misdemeanor under Proposition 47. "Section 12022.1 defines the felony for which the defendant had been released from custody on bail or on own recognizance as the 'primary offense,' and the new felony committed while on release as the 'secondary offense.' (§ 12022.1, subd. (a).) 'Section 12022.1 does not make the defendant's conviction of the primary offense an *element* of the enhancement for the purpose of proving the enhancement,' but there must be 'proof of conviction of the primary offense before the enhancement can be *imposed*.' (People v. Smith (2006) 142 Cal.App.4th 923, 935, 48 Cal.Rptr.3d 378, italics added.) Thus, a section 12022.1 enhancement allegation can be found true if the defendant committed a secondary offense while released from custody for the primary offense and is convicted of the secondary offense. But the imposition of the section 12022.1 enhancement must be stayed until the defendant is also convicted of the primary offense. (§ 12022.1, subd. (d).) Moreover, '[i]f the person is acquitted of the primary offense[,] the stay shall be permanent.' (*Ibid*.; see also In re Jovan B. (1993) 6 Cal.4th 801, 809, 25 Cal.Rptr.2d 428, 863 P.2d 673.) Consequently, section 12022.1 is a unique enhancement that, even if found true, cannot be *imposed* until the defendant is convicted of *both* the prior felony and the new felony committed while released on bail. (In re Jovan B., at p. 809, 25 Cal.Rptr.2d 428, 863 P.2d 673; People v. McClanahan (1992) 3 Cal.4th 860, 869, 12 Cal.Rptr.2d 719, 838 P.2d 241.) [¶] The effect of these circumstances means that if Proposition 47 can reach back and reduce to a misdemeanor the record of conviction for the primary offense, and that conviction becomes 'a misdemeanor for all purposes,' then the attached section 12022.1 enhancement in a nonfinal judgment remains intact but its two-year term must be struck and permanently stayed. In contrast, if Proposition 47 can reach back and reduce to a misdemeanor the record of conviction for the secondary offense, and that conviction becomes 'a misdemeanor for all purposes,' then the attached section

12022.1 enhancement in a nonfinal judgment must be dismissed entirely. [¶] In either circumstance, Proposition 47 ameliorates a section 12022.1 enhancement in a nonfinal judgment if one of the underlying felony convictions attached to the enhancement has been reduced to a misdemeanor conviction under the measure." [Italics in original.}

### *L. Application to section 1320.5 (felony failure to appear)*

Section 1320.5 provides that "[e]very person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." *People v. Buycks* (2018) 5 Cal.5th 857, 892, discusses the effect of reducing the underlying felony conviction to a misdemeanor: "[C]onsidering that a section 1320.5 conviction does not require the bail jumper's felony charge to have resulted in a felony conviction, or in any conviction at all, the fact that [defendant] successfully petitioned to have his narcotics offense reduced to a misdemeanor under Proposition 47 did not have any collateral effect on his section 1320.5 conviction. Under section 1170.18, subdivision (k), [defendant's] 'felony conviction' for his narcotics offense became 'a misdemeanor for all purposes,' but that did not alter the fact that he had been *charged* with a felony when he failed to appear while on bail for that felony charge. Accordingly, under these circumstances, [defendant's] conviction for section 1320.5 does not qualify for resentencing under Proposition 47." (Italics in original.)

Our Supreme Court discusses the purpose of section 1320.5 in *People v. Walker* (2002) 29 Cal.4th 577, 583: "With respect to section 1320.5, the legislative history states explicitly that its purpose is 'to deter bail jumping.' (Sen. Com. on Judiciary, analysis of Sen. Bill No. 395 (1983–1984 Reg. Sess.) p. 1; Sen. Republican Caucus, analysis of Sen. Bill No. 395 (1983–1984 Reg. Sess.) as amended June 16, 1983, p. 1.) The language and history of section 1320.5 also reflect the Legislature's view that fulfillment of this purpose requires punishment whether or not the defendant ultimately is convicted of the charge for which he or she was out on bail when failing to appear in court as ordered. (§ 1320.5 [every person who is 'charged with *or* convicted of' commission of a felony while released from custody on bail is subject to conviction (italics added)]; Assem. Com. on Crim. Law & Pub. Safety, analysis of Sen. Bill No. 395 (1983–1984 Reg. Sess.) p. 2 [observing that the proposed legislation would subject a defendant who failed to appear on an underlying felony charge to conviction and sanctions, 'even if the defendant was the victim of misidentification or was acquitted on the underlying charge'].)"

### *M. The court's reporting responsibilities*

There is nothing in Proposition 47 that requires the court to report resentencing and reclassification of crimes to other agencies. Furthermore, there is no requirement that an abstract of judgment be prepared for misdemeanor cases. (See § 1213.) Section

13151, however, requires courts to report all case dispositions in criminal proceedings within 30 days to the Department of Justice, if the person was arrested for the offense. It further provides that "[w]henever a court . . . order[s] any action subsequent to the initial disposition of a case, the court shall similarly report such proceedings to the department." As a result, the court's resentencing or reclassification order likely triggers reporting requirements.

An abstract of judgment may be used as both a record of conviction and as a tool for enforcing restitution. Section 1170.18(o) provides that resentencing hearings constitute a post-conviction release proceeding under Marsy's Law. At least to the extent that the resentencing modifies any restitution owed by the petitioner, an amended abstract of judgment should be prepared to facilitate the collection efforts by the victim.

If a court grants a petition for resentencing for a prison inmate, CDCR will need a certified copy of the minute order from the resentencing proceeding. The order should include all relevant information about the specific court findings and orders related to the new sentence. The order should be sent to the case records manager at the California institution where the individual is housed. If the inmate is housed in an out-of-state facility (COCF) or in a Community Correctional Facility (CCF), the documentation should be sent to the CDCR Contract Bed Unit (CBU). Faxed copies can be used by CDCR until the mailed copy is received.

CDCR has identified a number of issues concerning orders received from the trial courts after granting the resentencing of a person in state prison. The following issues create additional work for CDCR and the courts, and delay the proper processing of the inmate's new sentence:

- **Lack of proper identification of the inmate.** If possible, either the minute order or letter of transmittal should contain the full name of the inmate, date of birth, and either his or her CDCR number or CII number.
- **Incorrect code section for the order.** The correct code section to reference for the resentencing is section 1170.18(b), not section 1170.18(f), which is used for reclassification of crimes where the sentence has been completed.
- **Requests to CDCR to calculate the misdemeanor custody credits.** CDCR cannot calculate the credits for misdemeanor crimes and time served in county jail because the custody time is not limited to state prison. However, it can provide the court with all credits earned by the inmate while in prison to assist in the final calculation of custody credits. Guidance for the proper calculation of credits may be found in *People v. Buckhalter* (2001) 26 Cal.4th 20, which concerns resentencing following an appeal. Under *Buckhalter*, the trial court is charged with the responsibility to calculate all actual time and conduct credits earned in the county jail. The trial court also is to calculate the actual time earned in state prison; conduct credits in prison, however, are calculated by

CDCR. The CDCR calculations will be provided the court or the county jail upon request.

- **Calculation of an "out date.**" Although the prison normally calculates the out date for an inmate, it will expedite the processing of an inmate who is due to be released if the trial court designates the actual out date for the misdemeanor term. Having the information as part of the order of resentencing will obviate the need of CDCR to verify with the county jail that no further time is due under the new sentence. The determination of the out date, however, is not statutorily required.
- **Failure to designate whether the inmate is to be on parole or PRCS.** The court may not delegate the authority make a supervision placement order on resentencing by such phrases as: "report to parole or PRCS as directed by CDCR." The order of resentencing should clearly designate the proper category and length of supervision. If an offender is currently on PRCS and the resentencing order fails to address whether the inmate is to be placed on parole or PRCS, CDCR will leave the person on PRCS.
- **Failure to properly resentence on all counts if there are remaining non-eligible offenses.** If the court resentences an inmate to a misdemeanor for an eligible offense, but the inmate will remain in prison on one or more non-eligible felonies, the resentencing should include *all* offenses, with the misdemeanor term run either fully concurrent with or fully consecutive to the sentence for the remaining felonies. If the eligible offense was the principal term, it may be necessary to resentence one of the non-eligible offenses as the new, full-term principal offense. The "one-third the midterm" limitation applies only to crimes sentenced under the Determinate Sentencing Law, not to indeterminate terms or misdemeanors which are in different sentencing systems. (See § 1170.1(a).) If there are no remaining non-qualified felonies, it is not proper to order any remaining custody time "to be served in any penal institution." If only misdemeanor time remains, it must be served in county jail, not state prison.

### *N. Whether the court may grant a reclassification motion after case expunged under section 1203.4*

It is likely the court will have jurisdiction to consider a motion for reclassification of a qualified crime under section 1170.18(f), even though the conviction has been expunged under the provisions of section 1203.4. The language of subsection (f) is clear and simple: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." It does not specify that the relief is to be denied if the conviction has been dismissed under section 1203.4.

The obvious purpose of Proposition 47 is to remove felony consequences for qualified offenses, and, to the extent possible, the convictions "shall be considered a misdemeanor for all purposes. . . ." (§ 1170.18(k).) Granting an expungement under section 1203.4 is not unqualified. An expunged felony, for example, still may be charged as a felony prior conviction in a subsequent prosecution and the conviction must be disclosed in connection with certain applications for public office or licensure. (§ 1203.4(a)(1).) It would be consistent with the intent of Proposition 47 to permit a court to minimize any residual adverse effects of a conviction where relief under section 1203.4 has been granted.

Finally, it may be argued that the court no longer has any jurisdiction over a case dismissed under section 1203.4. Yet clearly section 1170.18(f) permits a process where the court may change the nature of a conviction, nunc pro tunc, to the date of the original sentencing, regardless of the lapse of time after the case has become final. There really is no material difference between "reopening" a conviction that has been resolved 20 years ago, and a conviction where 1203.4 relief was granted. Both are dead cases when the petition for relief is filed.

Conversely, the fact that defendant has completed a prison term for an eligible felony conviction which is subsequently reclassified as a misdemeanor under section 1170.18(f)-(i) does not preclude relief under section 1203.4a. A reclassified offense is a misdemeanor for all purposes, including the right to request relief under section 1203.4a. (*People v. Khamvongsa* (2017) 8 Cal.App.5th 1239.)

### *O. Parole violations*

When resentencing a defendant after recalling a felony conviction under section 1170.18, the court is required to place the defendant on parole for a period of one year unless the court decides to release the defendant from the condition. (§ 1170.18(d).) If the court does impose the parole term and the defendant thereafter violates a condition of parole, the court may impose additional jail time of up to six months. "If a parole violation is proved, section 3000.08, subdivision (f)(1), specifically authorizes the court to '[r]eturn the person to parole supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail, . . . . Section 3000.08, subdivision (g), in turn, limits confinement for a parole violation pursuant to subdivision (f)(1) to no more than 180 days in county jail . . . without reference to the time in custody the parolee had previously served. That the total time in custody may ultimately exceed 364 days if the resentenced defendant/parolee violates a condition of parole is simply part of the agreed-upon exchange for resentencing under Proposition 47." (*People v. Hronchak* (2016) 2 Cal.App.5th 884, 893.)

### *P. Registration as a narcotics offender*

Health and Safety Code, section 11590 requires certain narcotics offenders to register as such with local police agencies. The statute details the registerable offenses, which include possessory drug offenses made a misdemeanor under Proposition 47. Once these offenses are specified as a misdemeanor under section 1170.18, the defendant is no longer required to register as a narcotics offender. (*People v. Pinon* (2016) 6 Cal.App.5th 956.)

**Note: Effective January 1, 2020, the registration requirements of Health and Safety Code, section 11590 have been eliminated.**

### *Q. Effect of Proposition 47 on § 2933.1 credit limits*

In *In re Mallard* (2017) 7 Cal.App.5th 1220, defendant was convicted of carjacking and cultivation of marijuana. He was sentenced to prison consecutively on both charges. Thereafter he successfully petitioned for resentencing of the cultivation charge as a misdemeanor and received a consecutive county jail sentence. He sought to eliminate the credit restrictions of section 2933.1 for the time being served for the cultivation charge. The appellate court affirmed the denial of the request. Section 2933.1 applies to the defendant, not the charge. So long as the two charges are sentenced consecutively, the limitations of section 2933.1 still apply, even though the defendant completes the sentence on the violent felony and is serving the consecutive misdemeanor term in county jail.

### *R. Effect of Proposition 47 on commitment as a Mentally Disordered Offender (MDO)*

Sections 2962, *et seq*., provide for the treatment of specified parolees with severe mental disorders. *People v. Foster* (2019) 7 Cal.5th 1202 (*Foster*), addresses the circumstances where the defendant subsequently obtains a misdemeanor after resentencing of the offense of commitment. "Under the MDO statute (§§ 2970, 2972), the redesignation of Foster's felony as a misdemeanor does not undermine the validity of his initial civil commitment, which was legally sound at the time the determination was made. Nor does the redesignation alter the criteria governing Foster's eligibility for recommitment as an MDO. Equal protection principles do not compel a different result." (*Foster*, at p. 1206.)

*People v. Goodrich* (2017) 7 Cal.App.5th 699 (*Goodrich*), is in accord with *Foster*. "What Goodrich seeks is a retroactive collateral change to his *initial* commitment as an MDO as a result of having obtained relief pursuant to section 1170.18, subdivision (f). However, there is no indication that the voters, in passing Proposition 47, intended for its provisions to have the retroactive collateral consequence that Goodrich advances. To

the contrary, the procedures set forth in section 1170.18 that must be followed to obtain the resentencing and reclassification benefits of Proposition 47 indicate that the electorate intended a specific, limited *prospective* application of the relief available under the new law. (See *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313–314, 187 Cal.Rptr.3d 828; see also *People v. Noyan* (2014) 232 Cal.App.4th 657, 672, 181 Cal.Rptr.3d 601; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100, 183 Cal.Rptr.3d 362 [section 1170.18, subdivision (k), does not apply retroactively to change rules applied to determine appellate jurisdiction].) [¶] The stated purpose of Proposition 47 is a further indication that voters did not intend for it to have the effect that Goodrich proposes. Specifically, 'the express intent of Proposition 47 is to "reduce[ ] penalties for certain offenders convicted of *nonserious and nonviolent* property and drug crimes." ' ([*People v. Acosta* (2015) 242 Cal.App.4th 521] at p. 526, 195 Cal.Rptr.3d 121, italics added, original italics omitted.) An MDO, however, is, by definition, a person who not only has a 'severe mental disorder,' but who has served a prison sentence as a result of committing a serious or violent offense punishable by prison (i.e., one of the statute's serious or violent enumerated offenses or any other felony offense that involved violence or serious threats), and who continues to represent a "substantial danger of physical harm to others" because of the disorder. (§ 2962, subds. (d) & (e).) Proposition 47 was intended to reduce penalties for individuals who commit crimes that are *not serious or violent*, and, therefore, are not likely to pose a danger of physical harm to others. To apply Proposition 47 retroactively for the collateral purpose of invalidating an initial MDO commitment long after it was properly imposed would be at odds with the purpose intended by the voters." (*Goodrich*, *supra*, at p. 711; italics in original.)

### *S. Persons found not guilty by reason of insanity*

Section 1170.18 was amended effective January 1, 2018, to extend certain relief to persons committed to a state hospital because they were found not guilty by reason of insanity. Section 1170.18, subdivision (p)(1), provides: "A person who is committed to a state hospital after being found not guilty by reason of insanity pursuant to Section 1026 may petition the court to have his or her maximum term of commitment, as established by Section 1026.5, reduced to the length it would have been had the act that added this section been in effect at the time of the original determination. Both of the following conditions are required for the maximum term of commitment to be reduced. (A) The person would have met all of the criteria for a reduction in sentence pursuant to this section had he or she been found guilty. (B) The person files the petition for a reduction of the maximum term of commitment before January 1, 2021, or on a later date upon a showing of good cause."

Section 1170.18, subdivision (p)(2), specifies that if the maximum term of commitment is reduced, the new term must provide an opportunity to meet the requirements of section 1026.5, subdivision (b), for the extension of defendant's commitment because of dangerousness. If the new term does not provide sufficient time, the maximum term

of confinement may be extended up to 240 days from the date the petition for reduction is granted, for the purpose of meeting the requirements of section 1026.5, subdivision (b).

### *T. Effect of resentencing on gang conviction under section 186.22, subdivision (a)*

In *People v. Valenzuela* (2019) 7 Cal.5th 415 (*Valenzuela*), the defendant was originally convicted of grand theft of a bicycle, a felony, and participation in a criminal street gang under section 186.22, subdivision (a). The defendant ultimately was able to obtain resentencing of the theft conviction as a misdemeanor after the enactment of Proposition 47. The Supreme Court determined that the resentencing of the theft conviction eliminated the felony conduct necessary for the application of section 186.22, subdivision (a): "The reduction of defendant's grand theft conviction to a misdemeanor through Proposition 47 resentencing established the absence of an essential element of the street terrorism offense — *felonious* criminal conduct. With this element now absent, in the full resentencing that is to occur under the initiative the court cannot lawfully impose sentence on the street terrorism conviction. " (*Valenzuela*, at p. 419; italics in original.)

## APPENDIX I: TEXT OF PROPOSITION 47

## THE SAFE NEIGHBORHOODS AND SCHOOLS ACT

### SECTION ONE. Title.

This Act shall be known as "the Safe Neighborhoods and Schools Act."

### SECTION TWO. Findings and Declarations.

The people of the State of California find and declare as follows:

The People enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, maximize alternatives for nonserious, nonviolent crime, and invest the savings generated from this Act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. This Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.

### SECTION THREE. Purpose and Intent.

In enacting this Act, it is the purpose and intent of the people of the State of California to:

(1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this Act.

(2) Create the Safe Neighborhoods and Schools Fund with 25% of the funds to be provided to the Department of Education for crime prevention and support programs in K-12 schools, 10% of the funds for trauma recovery services for crime victims, and 65% of the funds for mental health and substance abuse treatment programs to reduce recidivism of people in the justice system.

(3) Require misdemeanors instead of felonies for non-serious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.

(4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors.

(5) Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.

(6) This measure will save significant state corrections dollars on an annual basis. Preliminary estimates range from $150 million to $250 million per year. This measure will increase investments in programs that reduce crime and improve public safety, such as prevention programs in K-12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.

**SECTION FOUR.**

Chapter 33 (commencing with Section 7599) is added to Division 7 of Title 1 of the Government Code, to read:

Chapter 33. Creation of Safe Neighborhoods and Schools Fund

7599. (a) A fund to be known as the "Safe Neighborhoods and Schools Fund" is hereby created within the State Treasury and, notwithstanding Government Code section 13340, is continuously appropriated without regard for fiscal year for carrying out the purposes of this chapter.

(b) For purposes of the calculations required by Section 8 of Article XVI of the California Constitution, funds transferred to the Safe Neighborhoods and Schools Fund shall be considered General Fund revenues which may be appropriated pursuant to Article XIII B.

7599.1. Funding Appropriation

(a) On or before July 31, 2016, and on or before July 31 of each fiscal year thereafter, the Director of Finance shall calculate the savings that accrued to the state from the implementation of this Act during the fiscal year ending June 30, as compared to the fiscal year preceding the enactment of this Act. In making the calculation required by this subdivision, the Director of Finance shall use actual data or best available estimates where actual data is not available. The calculation shall be final and shall not be adjusted for any subsequent changes in the underlying data. The Director of Finance shall certify the results of the calculation to the Controller no later than August 1 of each fiscal year.

(b) Before August 15, 2016, and before August 15 of each fiscal year thereafter, the Controller shall transfer from the General Fund to the Safe Neighborhoods and Schools Fund the total amount calculated pursuant to subdivision (a).

(c) Monies in the Safe Neighborhoods and Schools Fund shall be continuously appropriated for the purposes of this Act. Funds transferred to the Safe Neighborhoods and Schools Fund shall be used exclusively for the purposes of this Act and shall not be

subject to appropriation or transfer by the Legislature for any other purpose. The funds in the Safe Neighborhoods and Schools Fund may be used without regard to fiscal year.

7599.2. Distribution of Monies from the Safe Neighborhoods and Schools Fund

(a) By August 15 of each fiscal year beginning in 2016, the Controller shall disburse monies deposited in the Safe Neighborhoods and Schools Fund as follows:

(1) 25 percent to the State Department of Education, to administer a grant program to public agencies aimed at improving outcomes for public school pupils in kindergarten through 12th grade by reducing truancy and/or supporting students who are at-risk of dropping out of school or are victims of crime.

(2) 10 percent to the Victim Compensation and Government Claims Board, to make grants to trauma recovery centers to provide services to victims of crime pursuant to Government Code section 13963.1.

(3) 65 percent to the Board of State and Community Corrections, to administer a grant program to public agencies aimed at supporting mental health treatment, substance abuse treatment, and diversion programs for people in the criminal justice system, with an emphasis on programs that reduce recidivism of people convicted of less serious crimes, such as those covered by this measure, and those who have substance abuse and mental health problems.

(b) For each program set forth in paragraphs (1) through (3) above, the agency responsible for administering the programs shall not spend more than five percent of the total funds it receives from the Safe Neighborhoods and Schools Fund on an annual basis for administrative costs.

(c) Every two years, the Controller shall conduct an audit of the grant programs operated by the agencies specified in paragraphs (1) through (3) to ensure the funds are disbursed and expended solely according to this chapter and shall report his or her findings to the Legislature and the public.

(d) Any costs incurred by the Controller and the Director of Finance in connection with the administration of the Safe Neighborhoods and Schools Fund, including the costs of the calculation required by section 7599.1 and the audit required by subsection (c), as determined by the Director of Finance, shall be deducted from the Safe Neighborhoods and Schools Fund before the funds are disbursed pursuant to subsection (a).

(e) The funding established pursuant to this Act shall be used to expand programs for public school pupils in kindergarten through 12th grade, victims of crime, and mental health and substance abuse treatment and diversion programs for people in the

criminal justice system. These funds shall not be used to supplant existing state or local funds utilized for these purposes.

(f) Local agencies shall not be obligated to provide programs or levels of service described in this chapter above the level for which funding has been provided.

**SECTION FIVE.**

Section 459.5 [459a[4]] is added to the Penal Code, to read:

459.5. (a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for 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 may be punished pursuant to subdivision (h) of Section 1170.

(b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

**SECTION SIX.**

Section 473 of the Penal Code is hereby amended to read:

473. (a) Forgery is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(b) Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or money order does not exceed nine hundred fifty dollars ($950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for 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. This subdivision shall not be applicable to any

[4] In the version of the initiative submitted to the Secretary of State, the new section is designated "459a." In the version contained in the Voter Information Guide, the section is designated "459.5."

person who is convicted both of forgery and of identity theft, as defined in Section 530.5.

**SECTION SEVEN.**

Section 476a of the Penal Code is hereby amended to read:

476a. (a) Any person who, for himself or herself, as the agent or representative of another, or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers a check, draft, or order upon a bank or depositary, a person, a firm, or a corporation, for the payment of money, knowing at the time of that making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with the bank or depositary, person, firm, or corporation, for the payment of that check, draft, or order and all other checks, drafts, or orders upon funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170.

(b) However, if the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed ~~four hundred fifty dollars ($450)~~ nine hundred fifty dollars ($950), the offense is punishable only by imprisonment in the county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for 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. This subdivision shall not be applicable if the defendant has previously been convicted of ~~a~~ three or more violations of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475 or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476, or of this section.

(c) Where the check, draft, or order is protested on the ground of insufficiency of funds or credit, the notice of protest shall be admissible as proof of presentation, nonpayment, and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with the bank or depositary, person, firm, or corporation.

(d) In any prosecution under this section involving two or more checks, drafts, or orders, it shall constitute prima facie evidence of the identity of the drawer of a check, draft, or order if both of the following occur:

(1) When the payee accepts the check, draft, or order from the drawer, he or she obtains from the drawer the following information: name and residence of the drawer, business or mailing address, either a valid driver's license number or Department of Motor Vehicles identification card number, and the drawer's home or work phone number or place of employment. That information may be recorded on the check, draft, or order itself or may be retained on file by the payee and referred to on the check, draft, or order by identifying number or other similar means.

(2) The person receiving the check, draft, or order witnesses the drawer's signature or endorsement, and, as evidence of that, initials the check, draft, or order at the time of receipt.

(e) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary, person, firm, or corporation for the payment of a check, draft, or order.

(f) If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect.

(g) A sheriff's department, police department, or other law enforcement agency may collect a fee from the defendant for investigation, collection, and processing of checks referred to their agency for investigation of alleged violations of this section or Section 476.

(h) The amount of the fee shall not exceed twenty-five dollars ($25) for each bad check, in addition to the amount of any bank charges incurred by the victim as a result of the alleged offense. If the sheriff's department, police department, or other law enforcement agency collects a fee for bank charges incurred by the victim pursuant to this section, that fee shall be paid to the victim for any bank fees the victim may have been assessed. In no event shall reimbursement of the bank charge to the victim pursuant to this section exceed ten dollars ($10) per check.

**SECTION EIGHT.**

Section 490.2 is added to the Penal Code, to read:

<u>490.2. (a) Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950), shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has</u>

one or more prior convictions for 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.

(b) This section shall not be applicable to any theft that may be charged as an infraction pursuant to any other provision of law.

**SECTION NINE.**

Section 496 of the Penal Code is hereby amended to read:

496. (a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, ~~if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may,~~ if the value of the property does not exceed nine hundred fifty dollars ($950), ~~specify in the accusatory pleading that~~ the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for 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.

A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.

(b) Every swap meet vendor, as defined in Section 21661 of the Business and Professions Code, and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of a value in excess of nine hundred fifty dollars ($950) that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

Every swap meet vendor, as defined in Section 21661 of the Business and Professions Code, and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that

person, who buys or receives any property of a value of nine hundred fifty dollars ($950) or less that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, shall be guilty of a misdemeanor.

(c) Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees.

(d) Notwithstanding Section 664, any attempt to commit any act prohibited by this section, except an offense specified in the accusatory pleading as a misdemeanor, is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

**SECTION TEN.**

Section 666 of the Penal Code is hereby amended to read:

666. ~~(a) Notwithstanding Section 490, every person who, having been convicted three or more times of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in a county jail not exceeding one year, or imprisonment pursuant to subdivision (h) of Section 1170.~~

~~(b)~~(a) Notwithstanding Section 490, any person described in subdivision (b) ~~paragraph (1)~~ who, having been convicted of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

~~(1)~~(b) ~~This s~~ Subdivision (a) shall apply to any person who is required to register pursuant to the Sex Offender Registration Act, or who has a prior violent or serious felony conviction, as specified in ~~subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7~~ clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667, or has a conviction pursuant to subdivision (d) or (e) of Section 368.

~~(2)~~(c) This ~~subdivision~~ section shall not be construed to preclude prosecution or punishment pursuant to subdivisions (b) to (i), inclusive, of Section 667, or Section 1170.12.

**SECTION ELEVEN.**

Section 11350 of the Health and Safety Code is hereby amended to read:

11350. (a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b), ~~or~~ (c), (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

~~(b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code~~.

~~(c)~~ (b) Except as otherwise provided in this division, whenever a person who possesses any of the controlled substances specified in subdivision (a) ~~or (b)~~, the judge may, in addition to any punishment provided for pursuant to subdivision (a) ~~or (b)~~, assess against that person a fine not to exceed seventy dollars ($70) with proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

~~(d)~~ (c) Except in unusual cases in which it would not serve the interest of justice to do so, whenever a court grants probation pursuant to a felony conviction under this section, in addition to any other conditions of probation which may be imposed, the following conditions of probation shall be ordered:

(1) For a first offense under this section, a fine of at least one thousand dollars ($1,000) or community service.

(2) For a second or subsequent offense under this section, a fine of at least two thousand dollars ($2,000) or community service.

(3) If a defendant does not have the ability to pay the minimum fines specified in paragraphs (1) and (2), community service shall be ordered in lieu of the fine.

**SECTION TWELVE.**

Section 11357 of the Health and Safety Code is hereby amended to read:

11357. (a) Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment, ~~or shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code~~ except that such person may instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

(b) Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100).

(c) Except as authorized by law, every person who possesses more than 28.5 grams of marijuana, other than concentrated cannabis, shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

(d) Except as authorized by law, every person 18 years of age or over who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in a county jail for a period of not more than 10 days, or both.

(e) Except as authorized by law, every person under the age of 18 who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be subject to the following dispositions:

(1) A fine of not more than two hundred fifty dollars ($250), upon a finding that a first offense has been committed.

(2) A fine of not more than five hundred dollars ($500), or commitment to a juvenile hall, ranch, camp, forestry camp, or secure juvenile home for a period of not more than 10 days, or both, upon a finding that a second or subsequent offense has been committed.

**SECTION THIRTEEN.**

Section 11377 of the Health and Safety Code is hereby amended to read:

11377. (a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year ~~or pursuant to subdivision (h) of Section 1170 of the Penal Code,~~ except that such person may instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

~~(b)(1) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (f) of Section 11056, and who has not previously been convicted of a violation involving a controlled substance specified in subdivision (f) of Section 11056, is guilty of a misdemeanor.~~

~~(2) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (g) of Section 11056 is guilty of a misdemeanor.~~

~~(3) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in paragraph (7) or (8) of subdivision (d) of Section 11055 is guilty of a misdemeanor.~~

~~(4) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in paragraph (8) of subdivision (f) of Section 11057 is guilty of a misdemeanor.~~

~~(c)~~(b) ~~In addition to any fine assessed under subdivision (b), t~~The judge may assess a fine not to exceed seventy dollars ($70) against any person who violates subdivision (a), with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

**SECTION FOURTEEN.**

Section 1170.18 is added to the Penal Code, to read:

1170.18. (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended by this Act.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459a, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended by this Act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. In exercising its discretion, the court may consider:

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

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

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

(c) As used throughout this Code, "unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.

(d) A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to Section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released, resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.

(e) Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.

(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this Act had this Act been in effect at the time of the offense may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.

(g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.

(h) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).

(i) The provisions of this section shall not apply to persons who have one or more prior convictions for 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.

(j) Any petition or application under this section must be filed within three years after the effective date of the Act that added this section or at a later date upon a showing of good cause.

(k) Any felony conviction that is recalled and resentenced under subsection (b) or designated as a misdemeanor under subsection (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(l) If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.

(m) Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.

(n) Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this Act.

(o) A resentencing hearing ordered under this Act shall constitute a "post-conviction release proceeding" under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law).

**SECTION FIFTEEN. Amendment.**

This Act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as such amendments are consistent with and further the intent of this Act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this Act.

**SECTION SIXTEEN. Severability.**

If any provision of this measure, or part of this measure, or the application of any provision or part to any person or circumstances, is for any reason held to be invalid, the remaining provisions, or applications of provisions, shall not be affected, but shall remain in full force and effect, and to this end the provisions of this measure are severable.

**SECTION SEVENTEEN. Conflicting Initiatives.**

(a) This Act changes the penalties associated with certain non-serious, nonviolent crimes. In the event that this measure and another initiative measure or measures relating to the same subject appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure shall be null and void. However, in the event that this measure and another measure or measures containing provisions that eliminate penalties for the possession of concentrated cannabis are approved at the same election, the voters intend such provisions relating to concentrated cannabis in the other measure or measures to prevail, regardless of which measure receives a greater number of affirmative votes. The voters also intend to give full force and effect to all other applications and provisions of this measure, and such other measure or measures, but only to the extent such other measure or measures are not inconsistent with the provisions of this Act.

(b) If this measure is approved by voters but superseded by law by any other conflicting measure approved by voters at the same election, and the conflicting ballot measure is later held invalid, this measure shall be self-executing and given full force and effect.

**SECTION EIGHTEEN. Liberal Construction.**

This Act shall be liberally construed to effectuate its purposes.

## Appendix II: Table of disqualifying prior convictions

## The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

## TABLE OF DISQUALIFYING PRIOR CONVICTIONS

*Table 2*

| *Prior Conviction* | *Description* | *Authority*<br>*Pen C Sections* |
|---|---|---|
| Any Serious or Violent Felony punishable in California by life imprisonment or death. | | 667(e)(2)C)(iv)(VIII) |
| 182(a) | Conspiracy to commit any mandatory sex registration offense | Pen C §290(c) |
| 187 | Murder or attempt. (Any homicide or attempt from 187 to 191.5 | 667(e)(2)C)(iv)(IV) |
| 187 | Murder in perpetration or attempt: 261, 286, 288, 288(a), 289. | Pen C §290(c) |
| 191.5 | Vehicular manslaughter while intoxicated or attempt. | 667(e)(2)C)(iv)(IV) |
| 207 | Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.) | 667(e)(2)C)(iv)(I) |
| 207 | Kidnap to 261, 286, 288, 288(a), 289, 220 sex | Pen C §290(c) |
| 207(b) | Kidnap to child molest (*eff. 1-1-95 to 1-1-98*) | Pen C §290(c) |
| 208(d) | Kidnap to rape/oral cop./sodomy/foreign object (*eff. 1-1-96 to 1-1-98*) | Pen C §290(c) |
| 209 | Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289. | 667(e)(2)C)(iv)(I) |
| 209 | Aggravated Kidnap to 261, 286, 288, 288(a), 289, 220 sex | Pen C §290(c) |
| 220 | Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289.<br>(Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape). | 667(e)(2)C)(iv)(I) |
| 220 | Assault to commit sex crime. | Pen C §290(c) |
| 236.1(b) | Human trafficking with intent to effect a designated crime | Pen C §290(c) |
| 236.1(c) | Human trafficking Inducing a minor to engage in … | Pen C §290(c) |
| 243.4 | Sexual Battery[5] | Pen C §290(c) |
| 245(d)(3) | Assault with a machine gun on a peace officer or firefighter | 667(e)(2)C)(iv)(VI) |
| 261 | Rape | Pen C §290(c) |
| 261(a)(2) | Rape by force. | 667(e)(2)C)(iv)(I) |
| 261(a)(6) | Rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 262(a)(1) | Spousal rape w/force and a prison sentence | Pen C §290(c) |
| 262(a)(2) | Spousal rape by force. | 667(e)(2)C)(iv)(I) |
| 262(a)(4) | Spousal rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 264.1 | Rape in concert by force or violence | 667(e)(2)C)(iv)(I) |
| 264.1 | Rape or 289(a) in concert | Pen C §290(c) |
| 266 | Enticing an unmarried child for purpose of prostitution | Pen C §290(c) |
| 266c | Inducing consent by fraud | Pen C §290(c) |
| 266h(b) | Pimping, prostitute < 16 | Pen C §290(c) |
| 266i(b) | Pandering, prostitute < 16 | Pen C §290(c) |
| 266j | Procurement of child | Pen C §290(c) |
| 267 | Abducting a child for prostitution | Pen C §290(c) |
| 269 | Aggravated sexual assault of a child. | 667(e)(2)C)(iv)(I) |
| 269 | Aggravated sexual assault of a child < 14 | Pen C §290(c) |

| *Prior Conviction* | *Description* | *Authority*<br>*Pen C Sections* |
|---|---|---|
| 272 | Contributing…involving a lewd act | Pen C §290(c) |
| 285 | Incest | Pen C §290(c) |
| 286 | Sodomy | Pen C §290(c) |
| 286(c)(1) | Sodomy with child <14 + 10 years age differential. | 667(e)(2)C)(iv)(II) |
| 286(c)(2)(A) | Sodomy by force. | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(B) | Sodomy by force upon child <14 | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(C) | Sodomy by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 286(c)(3) | Sodomy with threat to retaliate | 667(e)(2)C)(iv)(I) |
| 286(d)(1) | Sodomy in concert by force…., threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 286(d)(2) | Sodomy in concert by force upon child <14 | 667(e)(2)C)(iv)(I) |
| 286(d)(3) | Sodomy in concert by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 288 | Lewd act upon a child | Pen C §290(c) |
| 288(a) | Lewd act upon a child under the age of 14 | 667(e)(2)C)(iv)(III) |
| 288(b)(1) | Lewd act upon a child by force… | 667(e)(2)C)(iv)(I) |
| 288(b)(2) | Lewd act by caretaker by force… | 667(e)(2)C)(iv)(I) |
| 288a | Oral Copulation | Pen C §290(c) |
| 288a(b)(1) | Oral copulation with a person under the age of 18 | Pen C §290(c) |
| 288a(b)(2) | Oral copulation with a person under the age of 16 | Pen C §290(c) |
| 288a(c)(1) | Oral copulation upon a child <14 + 10 years… | 667(e)(2)C)(iv)(III) |
| 288a(c)(2)(A) | Oral copulation by force | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(B) | Oral copulation by force… force upon child <14. | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(C) | Oral copulation by force… force upon child >14. | 667(e)(2)C)(iv)(I) |
| 288a(d) | Oral copulation in concert by force. | 667(e)(2)C)(iv)(I) |
| 288.2(a) | Felony distribution of harmful matter/minor(*eff. 1-1-90*) | Pen C §290(c) |
| 288.2(b) | Felony distribution of harmful matter/minor by e-mail, etc | Pen C §290(c) |
| 288.3 | Arranging meeting with a minor for a lewd act. etc. | Pen C §290(c) |
| 288.5 | Continuous sexual abuse | Pen C §290(c) |
| 288.5(a) | Continuous sexual abuse of a child with force… | 667(e)(2)C)(iv)(I) |
| 288.7(a) | Intercourse or sodomy with a child less aged 10 or younger. | Pen C §290(c) |
| 288.7(b) | Oral copulation, or sexual penetration /child 10 or younger | Pen C §290(c) |
| 289 | Sexual Penetration. | Pen C §290(c) |
| 289(a)(1)(A) | Sexual penetration by force, etc. | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(B) | Sexual penetration upon a child <14 by force… | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(C) | Sexual penetration upon a child >14 by force… | 667(e)(2)C)(iv)(I) |
| 289(a)(2)(C) | Sexual penetration by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 289(d) | Sexual penetration with an unconscious person. | Pen C §290(c) |
| 289(h) | Sexual penetration with a child under the age of 18 | Pen C §290(c) |
| 289(j) | Sexual penetration upon a child <14 + 10 years… | 667(e)(2)C)(iv)(II) |
| 311.1 | Material depicting a child in sexual conduct | Pen C §290(c) |
| 311.2(b) | Distribution, etc., of obscene matter for commercial purposes | Pen C §290(c) |
| 311.2(c) | Distribution, etc., of obscene matter to someone 18 or older | Pen C §290(c) |
| 311.2(d) | Distribution, etc., of obscene matter to a minor | Pen C §290(c) |
| 311.3 | Sexual exploitation/child | Pen C §290(c) |
| 311.4 | Use of minor in distribution of obscene matter | Pen C §290(c) |
| 311.10 | Advertising obscene matter depicting minors | Pen C §290(c) |
| 311.11 | Possession of child pornography | Pen C §290(c) |
| 314.1 | Indecent exposure | Pen C §290(c) |

| *Prior Conviction* | *Description* | *Authority*<br>*Pen C Sections* |
|---|---|---|
| 314.2 | Indecent exposure | Pen C §290(c) |
| 647(a), *former* | Loitering at toilet to solicit a lewd act | Pen C §290(c) |
| 647.6 | Child annoyance | Pen C §290(c) |
| 653f | Solicitation to commit murder. | 667(e)(2)C)(iv)(V) |
| 653f(c) | Solicit another to commit forcible rape /288(a)(c) /264.1 /288 /289 | Pen C §290(c) |
| 664/191.5 | Attempt vehicular manslaughter while intoxicated | 667(e)(2)C)(iv)(IV) |
| 664/187 | Attempt murder | 667(e)(2)C)(iv)(IV) |
| 664/any 290(c) | Any attempt on a mandatory sex registerable offense | Pen C §290(c) |
| 11418(a)(1) | Possession of a weapon of mass destruction | 667(e)(2)C)(iv)(VII) |

► There are many strike felonies which are not included Pen C §667(e)(2)(C)(iv). Gang crimes, robberies, residential burglaries, etc. i.e., an 11350 with three 211 priors is a misdemeanor!

## Appendix III: Proposition 47 crimes

## The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

SENTENCING UNDER PROPOSITION 47, *Effective 11-5-14.*
*Document changes, 11-13-14*

The offenses in Table 1, except for Penal Code §666(a), are misdemeanors, unless the defendant has suffered one or more designated prior convictions. (See Table 2 [Appendix II].) *Except for H&S C §11350*, if there is a designated prior, the defendant *may* be sentenced to 16 months, 2 or 3 years, pursuant to Penal Code § 1170(h). *H&S C §11350(a), requires a 16-2-3 (h) sentence when there is a designated prior conviction.*

*Table 1*

| *Offense Penal Code §* | *Description* | *Maximum Punishment Without Designated Prior* | *Punishment with Designated Prior* |
|---|---|---|---|
| 459** (to shoplift), is now the crime of *shoplifting*, §459.5(a)[m] | Shoplifting, entering a commercial establishment during regular business hours where the property taken or intended to be taken, is $950 or less.<br>Can't charge with burglary (459**) or theft (484-490.5) of the same property, *Pen C. §459.5(b.)* | 6 months, and/or fine up to $1,000. (See, Pen C §19.) | 16-2-3[w] (h) |
| 473(b) | Forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value is $950 or less.<br>This subdivision does not apply if the defendant is convicted of both forgery and identity theft (Pen C §530.5). | 1 year.* | 16-2-3[w] (h) |
| 476a(b) | If total of all NSF checks is $950 or less.<br>476a(b)[m] does not apply if the defendant has suffered 3 or more prior convictions for Section 470, 475, 476, 476a, or petty theft which was also a violation of 470, 475, 476, or 476a. Foreign priors with all the elements qualify. | 1 year.* | 16-2-3[w] (h) |
| 484 with prior | See, 666, below | | |
| 484(a) | Theft | 6 months when loss does not exceed $950.<br><br>See Pen C §490.2 | 16-2-3[w] (h) |
| 484b | Diversion of construction funds | | |
| 484c | Obtaining construction funds by false voucher | | |
| 484e(a); (b); (d) | Theft of access cards | | |
| 487(b)(1); (b)(2) | Theft of fowl, fruits, nuts…<br>Theft of shell fish… | | |
| 487(c) | Theft from the person | | |
| 487(d)(1); (d)(2) | Theft of an automobile or designated animal;<br>Theft of a firearm | | |
| 487a | Stealing a carcass | | |
| 487b | Converting real estate into personal property by severance. The maximum punishment for misdemeanor conversion remains at 1 year. Pen C §487c, | | |
| 487d | Theft from a mining claim | | |

| *Offense Penal Code §* | *Description* | *Maximum Punishment Without Designated Prior* | *Punishment with Designated Prior* |
|---|---|---|---|
| 487g | Stealing an animal for medical research… | | |
| 487i | Public housing fraud | | |
| 490.2(a)[m] | *Any* theft $950 or less is petty theft, punished as a *misdemeanor*. (Pen C §19, sets the maximum punishment at 6 months unless a different punishment is prescribed.) | | |
| Pen C §490.2(a): "Notwithstanding Section 487 *or any other provision of law* defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor,…" Pen C §503, et.al, is in this list. No effort was made to include every conceivable offense which may be classified as theft. | | | |
| 496(a) | Possession of stolen property with a value of $950 or less is a misdemeanor. | 1 year.* | 16-2-3[w] (h) |
| 503; 504; 504a; 504b; 505; 506; 506a | Embezzlement is punishable as a theft. (See, Pen C §§490a, 514 | See 490.2 | 16-2-3[w] (h) |
| 664/496 | Attempt to receive stolen property, in excess of $950. | 1 year [8] | 16-2-3[w] (h) |
| 666(a)[w] | Petty theft by:<br>► a sex registrant (*not limited to 290(c)*),<br>► or one who has a prior designated in Table 2,<br>► or who has served time for a prior conviction for: robbery (*Pen C §211)*; carjacking, (*Pen C § 215*); 368(d), (*theft from an elder by a non-caretaker)*, 368((e) (*theft from an elder by a caretaker)*; burglary (Pen C §459); petty theft (*Pen C §484*); grand theft (*Pen C § 487* (*probably as defined by Prop 47*);<br>►or a felony violation of Pen C §496,<br>►or auto theft under Veh C §10851.<br><br>This section does not preclude prosecution under 667((b-i) or 1170.12. (Pen C §666(c).) | Up to 1 year * as a misdemeanor, or 16-2-3 ~~(h)~~.[sp] | 16-2-3[w sp] |
| *Health & Safety Code* | | | |
| 11350(a) | Possession of a narcotic. H&S §11054(e), [*mecloqualone, methaqualone & GHB*], has been added to H&S §11350(a) | 1 year *<br>It is either a misdemeanor or a felony. | 16-2-3[f] (h) |
| 11350(b) | Former 11350(b), a wobbler, is now included in 11350(a), above. | | |
| 11357 | Possession of concentrated cannabis. | 1 year *, $500. | 16-2-3[w] (h) |
| 11377 | Possession of a controlled substance. | 1 year *. | 16-2-3[w] (h) |

* 1 year is 364 days, *effective 1-1-15*. (Pen C §18.5

## Appendix IV: Notice of Petition and Response

| | |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY*(Name, State Bar number, and address)*:<br><br>TELEPHONE NO.: FAX NO.:<br>E-MAIL ADDRESS:<br>ATTORNEY FOR (Name): | *FOR COURT USE ONLY* |
| PEOPLE OF THE STATE OF CALIFORNIA<br>v.<br>DEFENDANT: DATE OF BIRTH: | CASE NUMBER: |
| **NOTICE OF PETITION AND RESPONSE**<br><br>☐ **FOR RESENTENCING** (Pen. Code, § 1170.18(a))<br>☐ **FOR REDUCTION TO MISDEMEANOR** (Pen. Code, § 1170.18(f)) | *FOR COURT USE ONLY*<br>Date:<br>Time:<br>Department: |

**INSTRUCTIONS**

- *Before filing this form, petitioner should consult local rules and court staff to determine if a formal hearing on this petition will be scheduled*
- *If petitioner is currently serving a sentence, please fill out section A.*
- *If petitioner has completed serving his or her sentence, please fill out section B.*
- *Upon filing, petitioner is required immediately to provide notice to the District Attorney by providing a copy of this Notice of Petition to the District Attorney's Office.*

**CONVICTION INFORMATION**

On *(date)* _____, Petitioner, the defendant in the above-entitled criminal action, was convicted of the following felony offenses that have now been reclassified as misdemeanors *(specify code(s) and section(s))*: _____

and was sentenced to *(specify sentence imposed)*: _____

Petitioner has no prior convictions for offenses under Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to Penal Code section 290(c). Petitioner does not pose an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18(c).

**A. ☐ RESENTENCING**

Petitioner is currently serving the above sentence. Petitioner requests that the felony sentence be recalled and that Petitioner be resentenced to a misdemeanor under Penal Code section 1170.18(b), (d).

**B. ☐ REDUCTION TO MISDEMEANOR**

Petitioner has completed the above sentence. Petitioner requests that the eligible felony convictions listed above be reduced to misdemeanors under Penal Code section 1170.18(f), (g).

☐ Although a hearing is not necessary, I request a hearing for this determination. *(check only if you want a hearing for this determination)*

I declare under penalty of perjury and to the best of my information and belief that the foregoing is true and correct.

Executed on: _____

_____
(DATE) (SIGNATURE OF PETITIONER OR ATTORNEY)

_____ _____ _____
(ADDRESS, PETITIONER) (CITY) (STATE) (ZIP CODE)

**TO BE FILLED OUT BY THE PROSECUTING AGENCY ONLY:**

**DISTRICT ATTORNEY'S RESPONSE**:

Having received notice of the foregoing petition, the District Attorney responds as follows:

**A. ☐ RESENTENCING**

☐ The District Attorney has no objection to this petition. Petitioner is entitled to the requested relief.
☐ The petitioner is not eligible for the requested relief because:

☐ the specified offenses are not eligible under Penal Code § 1170.18

☐ the petitioner has at least one prior conviction for an offense under Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to Penal Code section 290(c).

☐ the petitioner poses an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18(c)

**B. ☐ REDUCTION TO MISDEMEANOR**

☐ The District Attorney has no objection to this petition. Petitioner is entitled to the requested relief.

☐ The petitioner is not eligible for the requested relief because:

☐ the specified offenses are not eligible under Penal Code § 1170.18

☐ the petitioner has at least one prior conviction for an offense under Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to Penal Code section 290(c).

Date:_____ _____
Deputy District Attorney

## Appendix V: Offenses listed in P.C. § 667(e)(2)(C)(iv)

## The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

## TABLE OF CRIMES LISTED IN P.C. § 667(e)(2)(C)(iv) – "Super Strikes"

| *Prior Conviction* | *Description* | *Pen C Sections* |
|---|---|---|
| Any Serious or Violent Felony | Punishable in California by life imprisonment or death. | 667(e)(2)C)(iv)(VIII) |
| 187 | Murder or attempt. (Any homicide or attempt from 187 to 191.5 | 667(e)(2)C)(iv)(IV) |
| 191.5 | Vehicular manslaughter while intoxicated or attempt. | 667(e)(2)C)(iv)(IV) |
| 207 | Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.) | 667(e)(2)C)(iv)(I) |
| 209 | Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289. | 667(e)(2)C)(iv)(I) |
| 220 | Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289.<br>(Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape). | 667(e)(2)C)(iv)(I) |
| 245(d)(3) | Assault with a machine gun on a peace officer or firefighter | 667(e)(2)C)(iv)(VI) |
| 261(a)(2) | Rape by force. | 667(e)(2)C)(iv)(I) |
| 261(a)(6) | Rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 262(a)(2) | Spousal rape by force. | 667(e)(2)C)(iv)(I) |
| 262(a)(4) | Spousal rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 264.1 | Rape in concert by force or violence | 667(e)(2)C)(iv)(I) |
| 269 | Aggravated sexual assault of a child. | 667(e)(2)C)(iv)(I) |
| 286(c)(1) | Sodomy with child <14 + 10 years age differential. | 667(e)(2)C)(iv)(II) |
| 286(c)(2)(A) | Sodomy by force. | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(B) | Sodomy by force upon child <14 | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(C) | Sodomy by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 286(c)(3) | Sodomy with threat to retaliate | 667(e)(2)C)(iv)(I) |
| 286(d)(1) | Sodomy in concert by force…., threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 286(d)(2) | Sodomy in concert by force upon child <14 | 667(e)(2)C)(iv)(I) |
| 286(d)(3) | Sodomy in concert by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 288(a) | Lewd act upon a child under the age of 14 | 667(e)(2)C)(iv)(III) |
| 288(b)(1) | Lewd act upon a child by force… | 667(e)(2)C)(iv)(I) |
| 288(b)(2) | Lewd act by caretaker by force… | 667(e)(2)C)(iv)(I) |
| 288a(c)(1) | Oral copulation upon a child <14 + 10 years… | 667(e)(2)C)(iv)(III) |
| 288a(c)(2)(A) | Oral copulation by force | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(B) | Oral copulation by force… force upon child <14. | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(C) | Oral copulation by force… force upon child >14. | 667(e)(2)C)(iv)(I) |
| 288a(d) | Oral copulation in concert by force. | 667(e)(2)C)(iv)(I) |
| 288.5(a) | Continuous sexual abuse of a child with force… | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(A) | Sexual penetration by force, etc. | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(B) | Sexual penetration upon a child <14 by force… | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(C) | Sexual penetration upon a child >14 by force… | 667(e)(2)C)(iv)(I) |
| 289(a)(2)(C) | Sexual penetration by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 289(j) | Sexual penetration upon a child <14 + 10 years… | 667(e)(2)C)(iv)(II) |

| *Prior Conviction* | *Description* | *Pen C Sections* |
|---|---|---|
| 653f | Solicitation to commit murder. | 667(e)(2)C)(iv)(V) |
| 664/191.5 | Attempt vehicular manslaughter while intoxicated | 667(e)(2)C)(iv)(IV) |
| 664/187 | Attempt murder | 667(e)(2)C)(iv)(IV) |
| 11418(a)(1) | Possession of a weapon of mass destruction | 667(e)(2)C)(iv)(VII) |

## Appendix VI: Order After Petition for Resentence or Reclassification

| ATTORNEY OR PARTY WITHOUT ATTORNEY*(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>E-MAIL ADDRESS:<br>ATTORNEY FOR (Name): | |
| PEOPLE OF THE STATE OF CALIFORNIA<br>v.<br>DEFENDANT: DATE OF BIRTH: | |
| ☐ ORDER AFTER PETITION FOR RESENTENCE OR RECLASSIFICATION<br>(Pen. Code, § 1170.18(b),(g)) | CASE NUMBER: |

The court finds from the records on file in this case and from the foregoing petition that the petitioner *(the defendant in the above-entitled criminal action)* is eligible for the following requested relief:

1. Petition for recall and resentencing is DENIED for the following reason(s):
   - ☐ the specified offense(s) is/are ineligible
   - ☐ the petitioner has at least one prior conviction for an offense under Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to Penal Code section 290(c).
   - ☐ the courts finds that the petitioner poses an unreasonable risk of danger to public safety under Penal Code § 1170.18(c).
   - ☐ other: _____

2. Petition for recall and resentencing is GRANTED. The following felony conviction(s) is/are recalled and reclassified as misdemeanors: _____

The petitioner is resentenced to (a) misdemeanor(s) with the following sentence: _____

With:

- ☐ parole
- ☐ continuing formal probation
- ☐ continuing informal probation
- ☐ granting credit for time served
- ☐ no supervision

3. Petition for reduction to misdemeanor is DENIED for the following reason(s):
   - ☐ the specified offense(s) is/are ineligible
   - ☐ the petitioner has at least one prior conviction for an offense under Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to Penal Code section 290(c).

4. Petition for reduction to misdemeanor is GRANTED. The following felony conviction(s) is/are now specified as misdemeanors: _____

5. The above-specified felony conviction(s) is/are hereby designated as a misdemeanor or misdemeanors for all purposes, except that the petitioner/applicant shall not own, possess, or have in his or her custody or control any firearm and the designation as misdemeanor will not prevent his or her conviction under Penal Code § 29800 et seq.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

*FOR COURT USE ONLY*

Date: _____ ☐ _____

(JUDICIAL OFFICER)